92-1454

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

N. A. WALDROP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Was it error to place upon Petitioner the burden of proving his withdrawal from and the termination of a conspiracy where the prosecution is dependent upon a continuing conspiracy theory without which the prosecution would have been barred by the Statute of Limitations?

2. Was it error to fail to consider the legal and equitable effects of an agreement to toll the running of the Statute of Limitations where such a proposed tolling agreement was prepared by the Government and tendered to the Petitioner four years after the investigation began and where the Government took no action to bring an indictment for two years after the proposed tolling agreement was rejected?

3. Was it error to deny Petitioner's Motion to Dismiss the indictment charging him with mail fraud and conspiracy where the forging of title application documents and mailing of automobile titles by a co-defendant were mailings unrelated to the original odometer tampering scheme, *United States* v. *Maze,* 414 U.S. 395 (1974)?

4. Was the Petitioner's right to a speedy trial, U.S.Const. amend. VI, violated despite the fact that he was unable to articulate at pretrial hearings a specific prejudice resulting from the delay, *Doggett* v. *United States,* 112 S.Ct. 2686 (1992)?

PARTIES

All parties to the proceedings appear in the caption of this Petition.

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IN THE

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NO.

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v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, N. A. Waldrop, by and through his attorney, Joel W. Collins, Jr., respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Third Circuit entered in this matter on December 8, 1992.

OPINIONS BELOW

The District Court Opinion denying Petitioner's relief was reported at 786 F.Supp. 1194 (M.D.Pa. 1991). The Third Circuit Court of Appeals decision affirming the conviction was an Unpublished Opinion, *United States* v. *Waldrop,* 92-7144, decided on December 8, 1992. The Petitioner's Petition for a Rehearing and Suggestion for Rehearing En Banc were denied on January 14, 1993.

JURISDICTION

The Judgment Order on hearing of the United States Court of Appeals for the Third Circuit, affirming Petitioner's conviction, was entered on January 22, 1993. This Court has jurisdiction to review the Judgment by Writ of Certiorari pursuant to 28 U.S.C. §1254(1) and Rule 20.1 of the Rules of The Supreme Court.

STATUTES INVOLVED

1. Constitutional Provisions

   (a) In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . (United States Constitution, Amendment VI).

2. Statutory Provisions:

   (a) Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. (Offenses not capital, 18 U.S.C. §3282).

   (b) Whoever, having devised . . . any scheme or artifice to defraud . . . , for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service, . . . , or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. (Mail fraud, 18 U.S.C. §1341).

   (c) If two or more persons conspire either to commit any offense against the United States, . . . and one or more of such persons do any act to affect the object of the conspiracy, each shall be fined not more than $10,000 or

imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (Conspiracy, 18 U.S.C. §371).

(d) Disclosure requirements upon transfer of ownership of motor vehicle. (15 U.S.C. §1988). (Pursuant to Supreme Court Rule 14.1[f] the text of this statute is included in the Appendix).

(e) Any person who knowingly and willfully commits any act or causes to be done any act that violates any provision of this subchapter or knowingly and willfully omits to do any act or causes to be omitted any act that is required by any such provision shall be fined not more than $50,000 or imprisoned not more than one year, or both. (15 U.S.C. §1990c(a) Pub.L. 92-513, Title IV, 413, as added Pub.L. 94-364, Title IV, §408(2), July 14, 1976, 90 Stat.985).

(f) Any person who knowingly and willfully commits any act or causes to be done any act that violates any provision of this subchapter or knowingly and willfully omits to do any act or causes to be omitted any act that is required by any such provision shall be fined not more than $50,000 or imprisoned not more than three years, or both. (15 U.S.C. 1990c(a) as amended Pub.L. 99-579, §3(b) October 28, 1986, 100 Stat. 3311.)

STATEMENT OF THE CASE

The joint state and federal investigation which led to this indictment began in South Carolina in 1984. The Petitioner, N. A. Waldrop, was the chief operating officer of Auction Recon Center, Inc., a South Carolina corporation, and a wholesaler of used automobiles located in Greenville, South Carolina. The lead agent on the case was Mr. William Kadlowac of the South Carolina Consumer Affairs Office.

In early 1985, Mr. Don Burley, a staff attorney with the Department of Justice, Office of Consumer Affairs, assumed the position as lead attorney in the investigation which involved the Petitioner and three others named in the indictment, Sammy Little, Wayne Sexton and Lawrence Walsh. Little was the owner of Little's Used Cars, an automobile dealership located in South Carolina. Sexton was an automobile mechanic who, as in independent contractor, worked for Auction Recon Center. Walsh was the owner-operator of State Auto Sales, a used car dealer, in DuPont, Pennsylvania.

The following facts are undisputed and contained in a Stipulation of Fact entered into by the United States and the Petitioner which appears in the Appendix to this Petition at Page 28. (Hereinafter App.) Petitioner Waldrop and Auction Recon Center purchased and reconditioned used cars. Some of the cars were sold to Little. Sexton then rolled back the odometers of those cars. Little in turn sold them to Walsh. Payment to Sexton for his services was made by Walsh. When the automobiles were sold to Little, all of Auction Recon's paperwork was in proper order reflecting the true odometer reading of the automobiles. However, when Little sold the cars to Walsh, the next set of paperwork provided with the automobile would show a lower odometer figure. Walsh would then use the paperwork supplied by Little and obtain Pennsylvania titles which reflected lower odometer mileage. The Government in its Stipulation conceded that all acts committed by Mr. Waldrop occurred outside the Statute of Limitations, with the last acts occurring in July or August of 1985. (App. ¶7-8, p.29) The case was not indicted until April 1991.

During the summer of 1985, the Pennsylvania Department of Transportation, based on information provided by Agent Kadlowac, seized 12 automobile title applications submitted by Walsh. (App. ¶9, p.29) Five of these titles were for automobiles listed in the Indictment against the Petitioner. (App. ¶11, p.30) These titles were turned over to Attorney Burley in August of 1985. (App. ¶12, p.30) On September 17, 1985, Little gave a

sworn statement to Agent Kadlowac which was a full confession and which included a list, complete with vehicle identification numbers, all of the cars contained in the Indictment filed on April 30, 1991. (App. ¶15, p.30) In that statement, Little described the entire operation and revealed that the odometers of these cars had been rolled back in early 1985. (App. **supra**)

The mail fraud violations which were charged in the Indictment resulted from the activities of Lawrence Walsh after April of 1986, and, therefore, chargeable as within the Statute of Limitations. On November 15, 1985, several months after the seizure of the earlier titles applied for by Walsh, the Pennsylvania Department of Transportation issued titles for the five automobiles listed in the Indictment. (App. 18, p.31) These titles bore the code number "999" in the space reserved for odometer readings. A "999" title is one which identifies an automobile on which true odometer reading is unknown, and which, therefore, makes no representation as to the accuracy of any odometer reading. (App. ¶18, p.31) In order to sell these cars more profitably, Walsh thereafter independently and within the Statute of Limitations period, as the Trial Court noted, "somehow" obtained new certificates of title from the Pennsylvania Department of Transportation. These new titles showed a falsified odometer reading and therefore replaced the previously issued "999" titles as stipulated by the Government:

> 24. In February and March of 1986, Larry Walsh submitted to the State of Pennsylvania 999 titles and requested that new titles. Each of the new titles issued by Pennsylvania include the cars false low mileage figure.
>
> 25. The signatures of representatives of Auction Recon Center were forged by, or at the direction of, defendant Walsh of State Auto Sales on numerous titled documents surrendered by State Auto Sales to the Pennsylvania Department of Transportation.

App. p.32.

These titles were obtained without the knowledge or participation of Mr. Waldrop. These automobiles were thereafter sold to individual consumers through Walsh's brother's automobile dealership, Honesdale Lincoln-Mercury of Honesdale, Pennsylvania. Petitioner's lack of awareness of these activities is illustrated by Walsh's admitted forgery of both the Petitioner's signature and those of his employees on the title application paperwork in 1986. (App. ¶25-26, p.32)

At the same time he was forging signatures and selling these automobiles with newly falsified titles, Walsh was ostensibly cooperating with the Department of Justice. He had previously met with and given a statement to Prosecutor Burley in Washington. Walsh also testified in June 1986 before a federal grand jury in Columbia, South Carolina. (App. ¶19-20, p.31) At the grand jury he admitted his participation in the rollback. It was after this grand jury appearance that Walsh sold the cars referred to in Counts 4, 5 and 6 of the Indictment. With the automobiles still in Walsh's possession, the Government took no measure to remove these cars from the market or to see to it that they were not sold without a misrepresentation as to odometer reading.

In 1986 when this case was considered by the grand jury in Columbia, South Carolina, co-defendants Walsh, Little and Sexton were all cooperating with the Government and testified before the grand jury. (App. ¶19, p.31) Sexton testified on June 3, 1986 in part:

> Q. If we look back at the paperwork we can't tell when the cars were rolled back and when they weren't. How long has Mr. Waldrop been stopped doing this? I mean, at some point in time he must have realized, "alright, it's time to get out of this business."
>
> A. Probably '84 or '85; I ain't sure.
>
> Q. At that point did he ever come out and say, "enough is enough. The government is getting into this now, so let's just quit. The time for this has passed."
>
> A. No. He said, you know, he wasn't going to do it.

(App. pp.34-35)

While Petitioner Waldrop had arranged for the meeting between Kadlowac and Little in September of 1985 and knew of the confessions and cooperation thereafter by Little, Walsh and Sexton with the Government, Petitioner was never subpoenaed to appear before the grand jury. It is a stipulated fact that after August 1985 Petitioner was not involved in any way with odometer tampering or other illegal acts. (App. ¶7, p.29)

Between 1986 and the indictments in 1991, the Government took no action on the case. The facts and documents which form the basis for the indictment were known to and in the possession of the Government in the fall of 1985.

In February of 1989, the Government recognized that the Statute of Limitations might "shortly run." As a result, Attorney Don Burley of the Department of Justice contacted Petitioner's counsel requesting that Petitioner waive the Statute of Limitations in this case, both as to himself and for Auction Recon Center, Inc. (App. p.36) The Tolling Agreement, prepared by the Government, recognized "that the Statute of Limitations may shortly run." (App. p.37) Counsel for Petitioner responded by letter dated March 22, 1989 that neither Petitioner nor his company would waive the Statute of Limitations. (App. p.39) In spite of this refusal, the Government did nothing for two more years. The Petitioner was indicted on August 6, 1991. The indictment against Petitioner charged him, among other things, with conspiracy, mail fraud, and false odometer certification. The bulk of the indictment was based on the activities of Lawrence Walsh in 1986, which occurred after the seizure of the original fraudulent titles by the United States. The mail fraud charges hinged on the mailing of the new titles which were procured after the issuance of the "999" titles.

Petitioner moved to dismiss the indictment on the grounds that the prosecution was barred by the Statute of Limitations. Petitioner contended that the forgery and mail fraud committed by Walsh in 1986 was not in furtherance of the original scheme.

In further support of this contention, Petitioner noted in the Stipulation of Fact that he had not engaged in any rollback or other criminal activity since August of 1985.

Petitioner also based his Motion to Dismiss on the ground that his Sixth Amendment right to a speedy trial had been violated. At hearings before the District Court on this issue, the trial judge pressed the question as to what prejudice the Petitioner could demonstrate as required by *United States* v. *Marion,* 404 U.S. 307 (1971). After repeated inquiries and observations by the Court regarding the lack of demonstrable prejudice, Petitioner conceded his Sixth Amendment issue due to a perceived inability to show a specific prejudice as required by *Marion*. This fact was noted by the District Court in Footnote 3 of its decision. *United States* v. *Waldrop,* 786 F.Supp. 1194, 1195 (M.D.Pa. 1991)

The District Court denied the Motion to Dismiss on November 12, 1991, by written order which appears in the Appendix to this Petition at p.10. The Court found that the Petitioner had not made every conceivable effort to prevent the sale of the automobiles and that the facts did not establish a withdrawal from the conspiracy. As to the substantive counts of mail fraud, the Court concluded that regardless of the independence of Walsh's activities, these mailings were still part of the original scheme. The District Court opinion glosses over Walsh's forgeries of Petitioner's signatures and the deceptions committed by Walsh to obtain new titles so that he need not sell the cars with "999" titles.

On December 3, 1991, the Petitioner entered a conditional plea of guilty, reserving the right to appeal. Petitioner entered pleas of guilty to the counts of conspiracy, possession of counterfeited or forged securities, with intent to deceive, mail fraud and false odometer certification. The Government stipulated that had this case been brought in 1986 in the District of South Carolina, the charge would have been brought as misdemeanor violations of the Odometer Statute, 15 U.S.C. §1990c. (App. ¶22, pp. 31-32)

On March 19, 1992, Petitioner was sentenced to the custody of the Attorney General for 24 months. During the course of the sentencing hearing, the District Court made statements which evidenced a prejudice that accrued to the Petitioner because of the pretrial delay. Prior to imposing sentence, the Court stated in relevant part as follows:

> If anyone thinks that you come into this courtroom emotionless and just going through a day's work, that's a great mistake. It's a very punishing assignment to have, and I have never approached the sentencing process without some personal affect or impact, indeed, sometimes even agony. And over the years, in sentencing, I've made my mistakes. I think probably sometimes I have sentenced too harshly, but I believe most of the time I've been on the lenient side, and in many instances, especially in the odometer area, that leniency has not accomplished what it was intended to accomplish.
>
> If I'm to believe what I'm being told in the submissions, the sentencing submissions, odometers, the fact that they've been prosecuted in this district for 15 years or so, and although some have reached prison sentences, most have not, and that the practice still continues, so it might cry out for a more severe attitude on the part of the sentencing court.

(App. p.40)

In other words, the Trial Court admitted that his sentence was harsher than it would have been had the case been timely prosecuted and had it come before him for sentencing at that time. The Petitioner filed a Notice of Appeal the same day, and execution of sentence was stayed pending appeal where jurisdiction was based on 28 U.S.C. §1291.

Petitioner's appeal raised three related issues. He argued that because the activities charged occurred outside the five year

Statute of Limitations, the prosecution was time barred.[1] He argued that he and the co-conspirators had withdrawn from and terminated the conspiracy prior to April 30, 1986, the cut off date for the Statute of Limitations. Petitioner also argued that the later intervening activities of the co-defendant Walsh were wholly independent acts not attributable to him or others in the original conspiracy, not part of an ongoing relationship, and, therefore, not properly available for use by the Government to defeat Petitioner's Statute of Limitations defense.

Petitioner was denied the opportunity to present oral argument on his appeal and his appeal was denied by a memorandum opinion on December 8, 1992. The three-judge panel accepted the Government's argument that cessation of activity does not constitute withdrawal. Under the rationale of the Third Circuit Opinion, Petitioner would have had to take an affirmative act, such as locating and repurchasing the clocked cars, in order to have withdrawn from the conspiracy. Further, the panel concluded that Walsh's illegal activities kept the conspiracy alive regardless of the knowledge of the others. As to the substantive counts, the Court concluded that Petitioner aided and abetted the subsequent activities of Walsh and "Walsh's activity after April 30, 1986 implicated Waldrop in the crime as well." (The panel decision appears at App. p.1)

After the panel decision, Petitioner requested a Rehearing En Banc. The request was denied on January 14, 1993. The Order denying the rehearing appears at App. p.41.

Petitioner seeks review of the decision of the Court of Appeals on the issues of whether the conspiracy was terminated, whether Petitioner withdrew from it and whether the charges were brought within the Statute of Limitations. Petitioner also seeks review of the workability and fairness of the standard set by the District Court and Court of Appeals relating to withdrawal

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[1] As to the misdemeanor charge of odometer rollback, the offense which the case would have been limited to had it been indicted in 1986, the Statute of Limitations is three years.

from a conspiracy. Further, Petitioner seeks a review of the questionwhether *Doggett* v. *United States,* 112 S.Ct. 2686 (1992) should be applied retroactively under *Griffin* v. *Kentucky,* 479 U.S. 314 (1987).

REASONS FOR GRANTING THE WRIT

1. REVIEW WILL RESOLVE THE CONFLICT WITHIN THE CIRCUIT COURTS OF APPEAL OVER THE ALLOCATION OF THE BURDEN OF PROOF FOR WITHDRAWAL.

(a) *A Conflict Exists Within the Circuits as to the Interpretation of Hyde* v. *United States, 225 U.S. 347 (1912) Dealing with Withdrawal from a Conspiracy.*

From the commencement of this case, Petitioner Waldrop has consistently asserted that his actions, as well as those of his co-defendants, constituted withdrawal from and termination of the conspiracy. This withdrawal terminated the conspiracy alleged in the indictment prior to April 30, 1986, the operative date for the Statute of Limitations. Under the standard enunciated by the Third Circuit Court of Appeals, a "defendant must present evidence of some affirmative act of withdrawal on his part, typically either a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals." *United States* v. *Steele,* 685 F.2d 793, 803-804 (3rd Cir. 1982). The District Court in this case went further, holding that "[w]ithdrawal is an affirmative defense, which the defendant has the burden of proving." *United States* v. *Waldrop,* 786 F.Supp. 1194, 1200 (M.D.Pa. 1991) (quoting United States v. *Firestone,* 816 F.2d 583, 589 [11th Cir. 1987]). The Third Circuit affirmed this, placing the burden of proof of withdrawal squarely on Waldrop.

This Court has not had the opportunity to address the defense of withdrawal from a conspiracy and the allocation of the burden of proof. Currently, a number of the circuits apply the

same standard as was applied in this case. *See,* e.g. *United States* v. *Barsanti,* 943 F.2d 428 (4th Cir. 1991); *United States* v. *Lash,* 937 F.2d 1077 (6th Cir. 1991); *United States* v. *LeQuire,* 943 F.2d 1554 (11th Cir. 1991); *United States* v. *MMR Corp.,* 907 F.2d 489 (5th Cir. 1990); United States v. *Little, 753 F.2d 1420 (9th Cir. 1984); United States* v. *Garrett,* 720 F.2d 705 (D.C. Cir. 1983); *United States* v. *Boyd,* 610 F.2d 521 (8th Cir. 1979); *United States* v. *James,* 609 F.2d 36 (2d Cir. 1979).

The Seventh Circuit Court of Appeals has adopted a different standard as to the burden of proving withdrawal from a conspiracy. Prior to 1981, it too followed the rule that the burden of proof rested upon the defendant. However, in 1981 the Seventh Circuit decided the case of *United States* v. *Read,* 658 F.2d 1225 (7th Cir. 1981), and adopted a new standard. Defendant Read, along with others, was charged with conspiracy, mail fraud and securities fraud arising out of the defendants' alleged attempt unlawfully to inflate the value of their corporation. Certain defendants claimed that they had withdrawn from the conspiracy.

While the district court rejected this argument, the Seventh Circuit reexamined the defense of withdrawal in light of *Hyde* v. *United States,* 225 U.S. 347 (1912). After examining *Hyde,* the court rejected the notion that it stood for the proposition that the burden rested on the defendant stating:

> Present law now states the burden of establishing withdrawal lies on the defendant. The withdrawal rule is based on a misinterpretation of Hyde's requirement that the defendant do "some act to disavow or defeat the purpose" of a conspiracy to withdraw.

Read at 1235-1236 (citations omitted)

The court went on to announce a new standard based on its view of a correct reading of *Hyde,* concluding that the other circuit courts had expanded the rule greatly beyond its intent and scope. Under the Read test, the burden does not shift and remains on the Government.

(b) *The Court's Standard for Withdrawal is Unworkable, and It Should have Applied the Standard Found in United States* v. *United States Gypsum Co., 438 U.S. 422 (1978) For Acts Sufficient to Establish Withdrawal or Abandonment.*

Based on the facts in this case, Petitioner argued that the other participants in the conspiracy, Walsh, Sexton and Little, clearly withdrew prior to April 30, 1986. However, this argument was rejected on the authority of *United States* v. *Lowell,* 649 F.2d 950 (3d Cir. 1981). Petitioner submits that, based on the facts in this case, the panel established an unworkable and unfair test for withdrawal. While *Lowell* stands for the proposition that the mere cessation of activity in furtherance of an illegal conspiracy does not necessarily constitute withdrawal, the panel opinion in this case required Petitioner to "do everything within his power . . . ", i.e., recapture all the automobiles in question and remove them from the market in order to withdraw from the conspiracy.

It is an undisputed matter of fact that prior to April 30, 1986, Little had provided the United States with the descriptions and vehicle identification numbers of all of the automobiles listed in the indictment. The United States stipulated as follows:

> On September 17, 1985 defendant Little gave a statement to federal investigator William Kadlowac witnessed by Lance D. Thomas, investigator for the United States Department of Transportation, which detailed the activities of State Auto Sales, DuPont, Pennsylvania, and Auction Recon Center in Greenville, South Carolina. This statement referred to, by serial number, all the cars contained in the indictment filed on April 30, 1991.

App. ¶15, p.30.

It is undisputed that neither Petitioner nor co-defendant Sexton (who actually rolled the odometers) participated in any odometer tampering or other acts related to odometer tampering after

August 1985. The remaining conspirator, Walsh, began cooperating with the Government in the summer of 1985 and provided information regarding the conspiracy.

In response to these actions, the panel opinion concluded these actions were not enough. It stated:

> Although Waldrop stopped selling rollbacked automobiles in 1985, there is no evidence that he affirmatively withdrew from the conspiracy. Thus, he did not satisfy the legal requirement for withdrawal. Nor do the statements given by Walsh and Little to the federal investigators in 1985 and early 1986 necessarily signify that they withdrew at that time. Such statements do not establish as a matter of law full cooperation with the Government. Nor can Waldrop persuasively argue that the Government's knowledge of the rollback scheme at that time cleanses him of his continued culpability.

United States v. *Waldrop,* No. 92-7144, Slip Op. at 5-6 (3rd Cir. Dec. 8, 1992).

The Court concluded that there was no basis to find that the conspiracy ended before the Statute of Limitations ran. Petitioner submits that the standard set forth in the panel opinion is unfair and unworkable. The undisputed facts establish that the Government knew well before April 30, 1986 who committed the rollbacks, where they were committed and how they were committed. The Government had a sworn statement in September 1985 with all the roles of each participant fully explained. In addition, the Government had the documents and thereby knew the vehicle identification numbers of the eight automobiles in question and was, therefore, able to trace them. While admittedly Petitioner was never interviewed by the Government, there was no additional information he could have provided to the Government that it did not already have. It is undisputed that the original scheme had been abandoned and the sale of clocked vehicles had stopped prior to 1986.

In *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978) this court was faced with the withdrawal issue in the context of an antitrust prosecution. There, the jury was charged as "to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy." *Id.* at 464. This court found that impractical methods of withdrawal were not proper. Instead, the court announced a less restrictive standard to establish withdrawal, namely:

> Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment.

Id. at 465 (citations omitted)

The activities of Little, Walsh and Sexton were certainly inconsistent with the object of the conspiracy. Petitioner himself encouraged his co-defendants, including Walsh; to tell the truth during the grand jury process. (App. ¶20, p.31)

On the other hand, the Third Circuit would have Petitioner go to unreasonable lengths in order to withdraw. Based on the Third Circuit opinion, the only way Petitioner could have withdrawn from this conspiracy was to trace and locate the cars listed in the indictment and repurchase them. Or he would have to shadow the every move of Larry Walsh and then, when he was about to sell one of the automobiles, prevent that sale through whatever means necessary. In fact, the district court noted in Footnote 27 of its Opinion that this is what the Petitioner should have done. *U.S.* v. *Waldrop,* 786 F.Supp at 1199 (M.D.Pa. 1991). The District Court held that, under the Government's theory, Petitioner should have done "everything within [his] power" to "prevent the commission of the crimes." *Id.* (citing *U.S.* v. *Piva,* 870 F.2d 753, 757 [1st. Cir. 1989]) The panel opinion adopted this view without addressing the fact that Waldrop, in Greenville, South Carolina, had no way of knowing what Walsh, in DuPont, Pennsylvania, was doing. Of course, if the cars had been sold with

the "999" titles, the purchaser would not have been defrauded at all, and there would have been no crimes committed within the Statute of Limitations.

The rigid standard set down by the Court of Appeals ignores its own previous holdings which set forth several conspiracy models and means by which to withdraw from these conspiracies. In *United States* v. *Lowell, supra,* the court examined the business enterprise model of conspiracy in which a conspiracy is fostered as part of an ongoing business relationship. Under that model, the court concluded that the standard for withdrawal was somewhat less than the strict standard it set forth in this case holding:

> where fraud constitutes the standard operating procedure of a business enterprise, affirmative action sufficient to show withdrawal as a matter of law from the conspiracy embodied in the business association may be demonstrated by the retirement of a coconspirator from the business, severance of all ties to the business and consequent deprivation to the remaining conspirator group of the services that constituted the retiree's contribution to the fraud.

Id. at 955. (citations omitted)

Applying the *Lowell* test to Petitioner's case, it would be evident that Petitioner and the others withdrew from the conspiracy. The facts demonstrate that after the investigation began Petitioner abandoned rolling back odometers as did Little and Sexton. Subsequent unforseen and independent criminal acts by Walsh were not part of the conspiracy. Therefore, applying the *Lowell* standard, the court would have found that business associations ceased, ties were severed, and services to other defendants were deprived.

When a car is sold with a tampered odometer, the illicit gain is realized immediately. However, the automobile itself may not immediately be transferred to an unsuspecting party. In fact, there are numerous scenarios which can be envisioned in which

the vehicle could be held for many years by one owner before being transferred to another owner. However, under the standard announced by the Third Circuit in this case, criminal liability would remain indefinitely as long as the automobile was in service. The unworkability of this standard is obvious.

2. WHERE THE GOVERNMENT EXECUTES A TOLLING AGREEMENT RECOGNIZING THE STATUTE OF LIMITATIONS WILL "SHORTLY RUN", IT SHOULD BE ESTOPPED FROM LATER CREATING EXPANSIVE THEORIES TO KEEP THE STATUTE OF LIMITATIONS FROM RUNNING.

In 1989, four years after the United States obtained all of the information which formed the basis of the 1991 indictment, its counsel recognized that the Statute of Limitations was about to run. As a result, Attorney Don Burley contacted Petitioner's counsel and requested that he waive the Statute of Limitations. The Tolling Agreement, a copy of which is contained in the Appendix at Page 37 stated in relevant part:

> I, N. A. Waldrop, having been informed that the Government is currently considering the filing of criminal charges against me (either through an indictment or an information); *having been further informed that the Statute of Limitations may shortly run with respect to certain of these charges;*

App. at p.37. (emphasis added)

The Circuit Court of Appeals did not address the proposed Tolling Agreement in its Opinion. Despite this, Petitioner believes that this is an important fact. The proposed Tolling Agreement, like many other Government activities in this case, evidences the fact that the Statute did, in fact, run. As stipulated, the Government was in possession of the information that formed the basis for its indictment in 1985. Four years later the Government acknowledged that the Statute of Limitations was about to run, sought to have Petitioner toll or waive it, learned that Petitioner refused to do so and then waited two more years

before doing anything. The Government then sought to have the Court embrace its novel theory that the Statute of Limitations in this case would never run so long as the cars were still on the road. Petitioner submits that the Government should be equitably estopped from prevailing under these circumstances.

While courts have had several opportunities to recognize the effect of an executed tolling agreement, there is no authority interpreting the effect or importance of a Government-offered but unexecuted Statute of Limitations tolling agreement. Petitioner submits that this Court should examine the effect of such a proposed agreement on the Government especially where the Government later denies that the Statute of Limitations has run. Such an analysis would contribute to the effective administration of justice and prevent unjust and expansive government interpretations of the Statute of Limitations.

3. THE SUBSTANTIVE COUNTS COMPRISED A SEPARATE SCHEME FROM THE ORIGINAL CONSPIRACY.

(a) *The Facts Do Not Support an Aiding and Abetting Theory of Liability.*

The substantive counts of mail fraud against the Petitioner were not part of the original scheme. Instead, the mail fraud was the independent and unrelated by-product of Walsh's scheme to procure new "actual" mileage titles using forged paperwork after the Government seized the original Pennsylvania titles and issued "999" titles denoting that the mileage was unknown. The panel opinion dismisses the significance of these facts finding that they were part of the original scheme and holding Petitioner liable therefor. Petitioner submits that the Statute of Limitations analysis previously set forth involving the defense of withdrawal is applicable to the substantive counts as well. The mail fraud counts on which Petitioner was indicted arise out of the mailing of applications for titles and titles to five automobiles where Walsh procured new low mileage titles as previously explained. Walsh's post-seizure activities were not part of the original scheme. They occurred after Little, Sexton and Petitioner had

ceased their activities and after the scheme was revealed to the Government. The only person who had a stake in these acts and accompanying sales was Larry Walsh. The panel dismisses this stating that "the subsequent sales simply completed the momentum Waldrop had set in motion the prior year." *U.S.* v. Waldrop, No. 92-7144 Slip Op. at 7 (December 8, 1992). Under this rationale, Waldrop is held liable as an aider and abettor to mail fraud of which the Government admitted he was totally unaware.

Petitioner's activities did not rise to the level of aiding and abetting. This Court has interpreted aiding and abetting to mean:

> Aiding and abetting has a broader application. It makes a defendant a principal when he *consciously shares in any criminal act* whether or not there is a conspiracy. And if a conspiracy is also charged, it makes no difference so far as aiding and abetting is concerned whether the substantive offense is done pursuant to the conspiracy . . . Aiding and abetting rests on a broader base; *it states a rule of criminal responsibility for acts which one assists another in performing.* (Emphasis added.)

Nye & Nissen v. *United States,* 336 U.S. 613, 620 (1949).

Petitioner did not participate in any knowing activity with Larry Walsh in the sale of the vehicles after Walsh obtained the "actual" mileage titles. There is nothing in the record, including the Stipulation of Facts, to support such a finding. Courts have consistently held that to be liable under an aiding and abetting theory, one must consciously act to make the venture succeed. *See Pinkerton* v. *United States,* 328 U.S. 640 (1946); *United States* v. *Salmon,* 944 F.2d 1106 (3rd Cir. 1991); *United States* v. *Reicherter,* 647 F.2d 397 (3rd Cir. 1981). Clearly, if Petitioner had been helping the venture succeed, Walsh would not have found it necessary to forge the signatures of Waldrop and his employees in his effort to get new "actual" mileage titles in 1986.

The panel cites authority and concludes that Petitioner need not have known the particular way that the automobiles were sold. However, this opinion begs the question of whether Petitioner should have foreseen that after the Government seizure of the titles, Walsh would double cross the Government with whom he was ostensibly cooperating, and procure false "actual mileage" titles. Certainly that was not a part of the original scheme. If Petitioner had been aiding and abetting Walsh, he could have provided him with affidavits or signatures to help obtain the new "actual" mileage titles. Instead, Walsh never contacted Petitioner and proceeded to forge Petitioner's signature and those of his employees, as the Government stipulated.

Additionally, the cars could have been sold with the "999" titles. There was no reason to believe that Walsh would discard titles and embark on a new course of fraudulent odometer representation. Under a proper aider and abettor analysis and withdrawal analysis, the 1986 acts of Walsh cannot be attributable to Petitioner. Without those acts, the Statute of Limitations clearly barred the entire case against Waldrop.

(b) *The Court of Appeals Should have Applied the Rulings of This Court in United States vs. Maze, 414 U.S. 395 (1974) to the Facts of this Case.*

From the commencement of this case, Petitioner has consistently asserted that his actions, as a matter of law, constituted a withdrawal from the original scheme. Footnote 1 of the panel Opinion states that this issue was not preserved for appeal stating:

> Waldrop also argues that the indictment should have been dismissed because the mailings which occurred were not in furtherance of the scheme to defraud once the conspiracy had terminated. This issue has not been preserved for appeal.

U.S. v. *Waldrop,* No. 92-7144 Slip Op. at 8 (December 8, 1992)

Petitioner submits that the panel misunderstood or misapprehended this argument. It is clearly part of his Statute of Limitations issue. The indictment in question charged a conspiracy consisting of Petitioner, Little, Sexton and Walsh. The mail fraud occurring within the Statute of Limitations was committed by Walsh alone and was clearly not part of the original conspiracy among the other individuals.

The panel relies on the holding in *United States* v. Schmuck, 489 U.S. 705 (1989) for the proposition that the mailing of a fraudulent title to the innocent purchaser of a car with a tampered odometers was in furtherance of the scheme to defraud. The mailings in this case were the product of Walsh's separate scheme after procuring the new, falsified, low mileage titles to replace the "999" titles. These mailings were not in furtherance of the original scheme. This court has had occasion in recent years to consider the proper scope and lawful application of the mail fraud statute, and it is clear that a practical, common sense approach to this question is preferred. Compare *McNally* v. *United States,* 483 U.S. 350 (1987) with *Carpenter* v. *United States,* 484 U.S. 19 (1987) and *United States* v. *Lane,* 474 U.S. 438 (1986). Here, the panel relies on *United States* v. *Schmuck, supra,* a factually distinguishable case, to reach its conclusion.

The scheme in *Schmuck* involved fewer steps and fewer persons than the one before the Court in this case. There, the odometer rollback operation consisted of Schmuck and a man known only as Fred who rolled back the odometers. After the rollback was complete, Schmuck would then sell the automobiles to unwitting auto dealers. The fact that the purchasing dealers were not aware of the rollbacks was critical in the court's decision. The Court reasoned that the mail fraud activities were critical for Schmuck's scheme to continue to succeed. If Schmuck could not pass the titles on to the dealers, he could not continue to sell the vehicles. Here, that is not the case. Walsh, the purchasing dealer, was fully aware of the rollbacks. It was he who paid Sexton for doing the rollbacks. The original transfer of titles and

cars occurred within the conspiracy. The later mail fraud committed by Walsh was not a necessary part of the original conspiracy. After the original titles were seized, Walsh could have sold the cars with the "999" titles but did not. Had he done so, there would have been no mail fraud within the statute. Since he could have sold the autos with the "999" titles, the later "actual" mileage titles were not necessary for the successful sale of the vehicles, as in *Schmuck*. This case is therefore clearly distinguishable from *Schmuck*.

Petitioner also submits, relying upon the dissent in *Schmuck* that the facts and circumstances of his case are more analogous to this Court's opinion in *United States* v. Maze, infra. Thomas Maze went on an interstate spree with stolen credit cards, and was convicted of mail fraud based on the mailing of sales slips by the merchants that he defrauded. This Court considered the question of whether these mailings were sufficiently closely related to his scheme to bring his conduct within the mail fraud statute, and decided that they were not. As Chief Justice Rehnquist observed:

> Respondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss. Indeed, from his point of view, he probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all.

United States v. *Maze,* 414 U.S. at 402.
Justice Scalia applied this rationale to odometer fraud in his *Schmuck* dissent stating:

> For though the Government chose to charge a defrauding of retail customers (to whom the innocent dealers resold the cars) it is obvious that, regardless of who the ultimate victim of the fraud may have been, the fraud was complete with the respect to each car when petitioner pocketed the dealer's money. As far as each

> particular transaction was concerned, it was inconsequential to him whether the dealer resold the car as it was inconsequential to the defendant in *Maze* whether the defrauded merchant ever forwarded the charges to the credit card company. Nor can the force of our cases be avoided by combining all of the individual transactions into a single scheme, and saying, as the Court does, that if the dealers' mailings obtaining title for each retail purchaser had not occurred, then the dealers would have stopped trusting petitioner for future transactions.

Schmuck, 489 U.S. at 723-724.

In the instant case, when a car was sold to Walsh with a tampered odometer, the Petitioner realized his anticipated gain. The subsequent transfers and activities by Walsh were inconsequential. Further, unlike the *Schmuck* case, there was no ongoing relationship between Walsh and Petitioner at the time of the mailings charged in the indictment.

Applying this logic to the present case, the 1986 mailings within the Statute of Limitations by Walsh did not assist the Petitioner or further the original scheme. The Court should reevaluate the application of *Schmuck* to the facts of this case and consider applying its rationale in *Maze*.

4. THIS COURT SHOULD RETROACTIVELY APPLY ITS RULING IN *UNITED STATES* V. *DOGGETT*, 112 S.Ct. 2686 (1992), TO THE FACTS OF THIS CASE REGARDING PRETRIAL DELAY.

When Petitioner initially challenged this prosecution, he moved to dismiss based upon the Statute of Limitations and the violation of his Sixth Amendment right to a speedy trial. During the pretrial motions hearings, the District Court consistently challenged Petitioner to demonstrate a specific prejudice as a result of the pretrial delay. For example, at a motions hearing

conducted on July 24, 1991, the District Court, following *United States* v. Marion, 404 U.S. 307 (1971) asked the following question regarding Petitioner's Motion to Dismiss:

> Let me ask you, Mr. Cognetti, the Government points out in the brief—you didn't read it, but it was going to be a question I was going to ask anyway. Let's assume all kinds of prosecutorial misconduct. What's the prejudice that would warrant a finding under *Marion* that this indictment should be dismissed because of a preindictment delay?

Appendix at P.

Similar inquiries colloquies occurred at other motions hearings in which the District Court attempted to discover what specific prejudice resulted from the pretrial delay. The only demonstrable prejudice which Petitioner could show is that had this case been timely prosecuted, it would have been indicted as a misdemeanor in South Carolina. The Government stipulated as follows:

> 22. Prior to the June, 1986, grand jury in Columbia, South Carolina, the United States Attorney in Columbia, South Carolina, had handled all of its odometer tampering cases through the charge of odometer tampering under 15 U.S.C. §1990(c), which was at that time a misdemeanor offense.
>
> 23. The grand jury in South Carolina, after hearing whatever the government presented, was never presented, and never returned, an indictment.

Beyond that prejudice, Petitioner was unable to demonstrate any other specific prejudice which accrued to him because of the delay.

The District Court recognized this in its memorandum opinion denying Petitioner's relief stating:

> The defendants originally asserted a Fifth Amendment (sic) due process violation because of pre-indictment delay but were unable to present any competent evidence or argument demonstrating prejudice.

U.S. v. *Waldrop,* 786 F.Supp. at 1195 (M.D.Pa. 1991)
Subsequently, at the sentencing, the District Court made a statement constituting a prejudice from the delay which the Petitioner obviously could not have foreseen and which he could not point to during the pretrial hearing on his motion. Prior to imposing sentence, as quoted on Page 10 herein, the District Court observed that it had in previous years been lenient in odometer cases but that now it had a "more severe attitude."

In June of 1992 this Court rendered its opinion in the case of *Doggett* v. *United States, supra,* which directly impacts upon the issue of preindictment delay and the prejudice which Petitioner must demonstrate in order to succeed.

Petitioner submits that the Court should apply the standards of *Doggett* to his case, notwithstanding the fact that he did not preserve his Sixth Amendment motion and notwithstanding the fact that the denial of his Sixth Amendment rights was not a part of his appeal to the Third Circuit Court of Appeals. This Court has held that "failure to apply newly declared constitutional rule to criminal cases pending on direct review violates basic norms of the constitutional adjudication." *Griffith* v. *Kentucky,* 479 U.S. 314, 322 (1987). The Third Circuit Court of Appeals was neither asked to review this case in light of *Doggett* nor asked to review this case in light of a claim of denial of the Sixth Amendment rights. This Petition for a Writ of Certiorari seeks to have this Court,applying the rule of *Griffith* v. *Kentucky,* now apply the *Doggett* standard to the facts and circumstances of this case and decide whether Petitioner's conviction should be set aside.

In *Doggett* v. *United States, supra,* this Court eliminated the requirement that a defendant prove demonstrable, specific prejudice when alleging denial of his right to a speedy trial. In

Doggett, the petitioner encountered a six year delay before trial which this Court attributed to the Government. Doggett moved to dismiss the prosecution on the grounds of speedy trial. The Trial Judge denied the motion finding "no affirmative showing that the delay had impaired his ability to mount a successful defense or to otherwise prejudice him." The Eleventh Circuit Court of Appeals, also operating under the *Marion* standard, denied Doggett's appeal holding that he could only prevail by showing "actual prejudice." *See, United States* v. *Doggett,* 906 F.2d 573 (11th Cir. 1990).

This Court granted Doggett's petition for certiorari, 111 S.Ct. 1070 (1991) and reversed his conviction on June 24, 1992, remanding the case for dismissal of the charges.

Justice Souter, writing for the majority, rejected the Government's argument and the rationale of *Marion* holding as follows:

> [T]he government claims Doggett has failed to make any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence. Though Doggett did indeed come up short in this respect, the government's argument takes it only so far. Consideration of prejudice is not limited to the specifically demonstratable, . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim . . . impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can rarely be shown . . . thus we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.

Doggett at 2692, 2693.

Petitioner was unable to articulate specific prejudices which accrued as a result of the Government's nearly six year delay. As

the evidence reveals, that delay was not necessary for the Government to gain more evidence. Even if it had been necessary, it would make no difference under the Statute. Clearly, the Government could have brought its case against Petitioner in 1985 but chose, for whatever reason, knowingly to drag its feet until 1991. This Court in *Doggett* specifically counselled against such activity by stating:

> Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority. The government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the government attaches to securing a conviction, the harder it will try to get it.

Doggett at 2693, 2694.

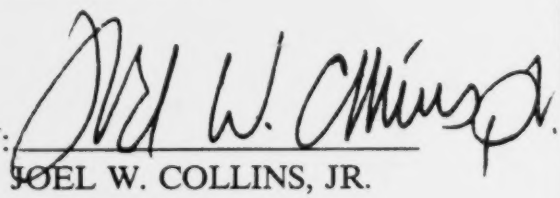
Petitioner submits that his case is factually stronger and equitably more compelling than Doggett's. During his lengthy delay, Petitioner, like Doggett, refrained from any unlawful activity. (See Stipulation, No.7) And while the time ticked away, and although he was unable to show any specific prejudice that resulted from that passage of time, he found himself nearly six years later facing, not misdemeanor charges in his home state, but rather felony charges in Pennsylvania. In the interim, the only activity the Government entered into was to attempt to have the Petitioner sign a tolling agreement waiving his rights under the Statute of Limitations. After Petitioner rejected that waiver agreement, the Government proceeded to wait over two more years before taking any action. The *Doggett* standard should be applied and Petitioner's case should be reviewed by this Court in light of that standard.

CONCLUSION

Petitioner prays for a Writ of Certiorari to review his conviction because, although he was a member of a conspiracy, he was not subject to prosecution because he withdrew from that conspiracy, and it was terminated prior to April 30, 1986, thereby starting the Statute of Limitations to run. Had the withdrawal from and termination of the conspiracy been properly analyzed, he would not have been convicted. In addition, under the standard set forth by this Court in *Doggett* v. *United States,* the Government should not have been allowed to pursue its indictment of the Petitioner given the inordinate and unjustified delay. For the foregoing reasons, the Writ should issue, Petitioner's case should be reviewed, and his conviction should be reversed.

Respectfully submitted,

COLLINS & LACY

BY: 

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PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

NOT FOR PUBLICATION

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 92-7144

UNITED STATES OF AMERICA

v.

N.A. WALDROP

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (D.C. CRIMINAL NO. 91-00083-01) DISTRICT JUDGE: HON. WILLIAM J. NEALON

Submitted Under Third Circuit Rule 12(6) December 3, 1992
Before: SLOVITER, *Chief Judge,* GREENBERG and SEITZ, *Circuit Judges*
(Opinion Filed: December 8, 1992)

MEMORANDUM OPINION OF THE COURT

SLOVITER, *Chief Judge.*

Defendant N.A. Waldrop entered a conditional plea of guilty to four counts of a 20-count superseding indictment in conjunction with the sale of eight automobiles with "rolled back" odometers. Specifically, he pled guilty to (i) conspiracy to commit various offenses against the United States, 18 U.S.C. § 371

(count 1); (ii) the possession of counterfeited or forged securities, with intent to deceive, 18 U.S.C. § 513 (count 2); (iii) mail fraud, 18 U.S.C. § 1341 (count 10); and (iv) false odometer certification, 15 U.S.C. §§ 1988, 1990c (count 19). Pursuant to 28 U.S.C. § 1291 and Federal Rule of Criminal Procedure 11(a)(2), Waldrop reserved the right to appeal the district court's denial of his pretrial motion to dismiss the indictment on the ground it was untimely.

I.

Facts and Procedural History

The relevant facts for this appeal as alleged by the government in its indictment or as stipulated to by both parties are as follows. Waldrop, the Chief Operating Officer of Auction Recon Center, Inc., a wholesaler of used automobiles in South Carolina, entered into a scheme with Wayne Sexton, an automobile mechanic, Sammy Little, the owner of Little's Used Cars, a South Carolina automobile dealer, wholesaler, and retailer, and Lawrence Walsh who operated State Auto Sales, a purchaser and wholesaler of used automobiles in Pennsylvania, to defraud purchasers by selling them used automobiles with rolled back odometers.

Waldrop, through Auction Recon Center, would purchase late-model, high-mileage automobiles; Sexton would "roll back" the odometers; and Waldrop would then sell the automobiles to Walsh. In an attempt to disguise Walsh as the direct purchaser of the automobiles, Waldrop would direct his employees first to bill the sale of the vehicle to Sammy Little's dealership with the correct high-mileage figure, and then to bill the sale of that same vehicle, with the false low-mileage figure, to Walsh's dealership. Once Walsh received the automobiles, he would obtain titles from the Pennsylvania Department of Transportation ("DOT") that corresponded to the false low-mileage figure. Walsh would then resell the vehicle to other dealers who would eventually make the sales to the ultimate consumers, who paid more than they would have had they known the correct mileage.

By June 1, 1986, a federal grand jury investigation had begun in South Carolina at which Walsh, Little and Sexton testified. Waldrop, Sexton, Little and Walsh were indicted in the Middle District of Pennsylvania on April 30, 1991. Waldrop, Little and Sexton filed a motion to dismiss the indictment alleging that all of the counts against them were either barred by the statute of limitations or not sustainable as a matter of law.

The parties agree that pursuant to the applicable 5-year statute of limitations, 28 U.S.C. § 3282, all offenses charged must have occurred after April 30, 1986. The indictment alleged that the conspiracy continued until September 1986. It also alleged that after April 30, 1986 Walsh committed four overt acts as part of defendants' odometer tampering scheme, specifically signing the title of a 1983 Chevrolet, signing the reassignment of that title, signing a bill of sale and odometer statement in connection with the sale of that Chevrolet by Honesdale Lincoln-Mercury (which is owned by Larry Walsh's brother) to Neiman's Used Cars; and signing an odometer statement in connection with the sale of another 1983 Chevrolet to Tunimac Empire Motors.

For purposes of resolving the motion to dismiss, the parties stipulated that the government had "no evidence of odometer tampering or affirmative acts committed by Defendants, Waldrop, Little and Sexton, related to odometer tampering or title washing after August 1985;" that Waldrop stopped selling tampered vehicles to Walsh in 1985; and that Walsh was expected to testify at trial that Waldrop had told him in a telephone conversation before Walsh's grand jury appearance not to lie for him. After the district court denied defendants' motion to dismiss the superseding indictment, Waldrop entered the conditional plea of guilty as set forth above. He confines this appeal to the issue of the statute of limitations.

II.

Discussion

Waldrop argues that the conspiracy count and the three substantive counts to which he entered a conditional plea of guilty should have been dismissed by the district court. We apply the same standard as the district court in reviewing a denial of a motion to dismiss an indictment as a matter of law. Looking at the factual allegations set forth in the indictment (as modified or enhanced by the facts stipulated to by both the parties for the purpose of resolving the motion to dismiss), we ask whether if those facts are true, a criminal offense has been alleged. *United States v. Besmajian,* 910 F.2d 1153, 1154 (3d Cir. 1990).

Waldrop argues first that all of the other participants in the conspiracy, Walsh, Sexton, and Little, withdrew from the conspiracy before April 30, 1986, leaving him no one with whom to conspire. We need not decide the effect of a withdrawal from a conspiracy by all of the other members because Waldrop has failed to show that all of the members of this conspiracy withdrew as of April 30, 1986.

Mere cessation of activity in furtherance of an illegal conspiracy does not necessarily constitute withdrawal. *United States v. Lowell,* 649 F.2d 950, 955 (3d Cir. 1981). As we stated in *United States v. Steele,* "[t]he defendant must present evidence of some affirmative act of withdrawal on his part, typically a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals." 685 F.2d 793, 803-04 (3d Cir. 1982); *see also United States v. Rosa,* 891 F.2d 1063, 1069 (3d Cir. 1989) ("[O]ne who willfully enters an agreement to commit a crime remains a participant in the agreement unless and until he communicates or otherwise objectively manifests a decision to renounce the agreement.").

Although Waldrop stopped selling rolled back automobiles in 1985, there is no evidence that he affirmatively withdrew from the conspiracy. Thus, he did not satisfy the legal requirement for withdrawal. Nor do the statements given by Walsh and Little to

the federal investigators in 1985 and early 1986 necessarily signify that they withdrew at that time. Such statements do not establish as a matter of law full cooperation with the government. Nor can Waldrop persuasively argue that the government's knowledge of the rollback scheme at that time cleanses him of his continuing culpability.

It is particularly significant that Walsh's illegal activities continued well past April 30, 1986. In the absence of any affirmative steps by the conspirators to withdraw or to inform the other coconspirators of their withdrawal, there was no action sufficiently "repudiatory" to be characterized as withdrawal. *Lowell,* 649 F.2d at 956-57. It follows that there was no record basis to find that the conspiracy ended before the statute of limitations ran.

We turn then to Waldrop's contention that the substantive counts of mail fraud were barred by the statute of limitations. To the extent that his argument on the substantive counts incorporates his contention that the parties withdrew from the mail fraud scheme, the foregoing discussion rejecting withdrawal in the context of the conspiracy is equally applicable. This does not suggest that Waldrop could not have proven withdrawal as a matter of fact had he chosen to go to trial. However, by pretermitting proceedings and pleading guilty, Waldrop has given up his opportunity to raise the withdrawal issue as a fact matter before the jury. Thus, he is limited to showing withdrawal as a matter of law, and this he has failed to do.

Waldrop argues however that the Pennsylvania DOT effectively terminated the original mail fraud scheme in May and June of 1985, when it seized 12 automobile titles and the corresponding applications for new Pennsylvania titles submitted by Walsh through State Auto Sales. The Pennsylvania DOT sent the seized titles to the United States Department of Justice for its investigation. On or about November 15, 1985, the Pennsylvania DOT issued "999" titles, which indicate that the true mileage of an automobile is unknown, for five of the automobiles previously altered by Waldrop pursuant to the scheme. In February and

March, 1986, Walsh forged the signatures of representatives of Auction Recon Center, submitted the "999" titles to Pennsylvania DOT, received new titles with the false low-mileage figure, and resold the cars, all without Waldrop's actual knowledge.

Waldrop contends that at the time of these events he was no longer engaged in the scheme and, to the extent the activity continued, it was a separate scheme to which he was not a party. Once again however, Waldrop misconceives the issue before us. The district court was not obliged to accept Waldrop's argument that the "999" scheme was wholly independent from that which had taken place before. Indeed, the subsequent sales simply completed the momentum Waldrop had set in motion the prior year. The odometers on the cars listed in the indictment may have been rolled back prior to April 30, 1986, but the titles were obtained and the ultimate sales to the consumers made after that date. Thus, a factfinder could have found that the activities of Walsh after April 30, 1986 were part of the original scheme to defraud.[1]

Moreover, Waldrop is culpable as an aider and abettor for the substantive offenses committed by Walsh that extended beyond April 1986. The government alleged that Waldrop aided and abetted Walsh's commitment of the substantive crime of procuring falsified titles and odometer certifications by sending Walsh the cars with tampered odometers. *See United States v. Dixon*, 658 F.2d 181, 189 n. 17 (3d Cir. 1981) (aiding and abetting proven by evidence that defendant knew of the commission of the substantive offense and acted with the intent to facilitate it);

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1. Waldrop also argues that the indictment should have been dismissed because the mailings which occurred were not in furtherance of the scheme to defraud once the conspiracy had terminated. This issue has not been preserved for appeal. In any event, the Supreme Court clearly rejected this argument in *United States v. Schmuck*, where it held that the mailing of a title between the state and the innocent purchasers of cars with tampered odometers was in furtherance of the scheme to defraud because the scheme depended on a "successful passage of title among the various parties." 489 U.S. 705, 712 (1989).

see also United States v. Pearlstein, 576 F.2d at 546 (aider and abettor must "associate himself with the unlawful venture and participate in it with the intent that its illegal objective be attained"). Waldrop need not have known the "particular way" that the automobiles in the indictment were sold in order to have been an aider and abettor. It follows that Walsh's activity after April 30, 1986 implicates Waldrop in the crime as well.

III.

Conclusion

For the foregoing reasons, we will affirm the district court's denial of Waldrop's motion to dismiss the indictment.

TO THE CLERK:

Please file the foregoing opinion.

s/
Chief Judge

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. CR:91-083-01, 02, 03, 04

N.A. WALDROP, a/k/a/ "FAT" WALDROP;
LAWRENCE WALSH;
SAMMY LITTLE;
WAYNE SEXTON

ORDER

NOW, this 1st day of November, 1991, IT IS HEREBY ORDERED THAT, in accordance with the attached Memorandum, the defendants' motions to dismiss the superseding indictment are denied.

s/
United States District Judge

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. CR:91-083-01, 02, 03, 04

N.A. WALDROP, a/k/a/ "FAT" WALDROP;
LAWRENCE WALSH;
SAMMY LITTLE;
WAYNE SEXTON

MEMORANDUM

In this criminal case, predicated upon an alleged odometer fraud,[1] there are several motions by the defendants to dismiss the

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[1] The Government charges included:

Waldrop:

Count 1; 18 U.S.C. § 371 (conspiracy)
Counts 2-3-4-5-6-7; 18 U.S.C. § 513 (possession of forged and counterfeited securities with intent to deceive)
18 U.S.C. § 2 (aiding and abetting the above)
Counts 8-9-10-11-12-13-14; 18 U.S.C. § 1341 (obtaining money or property by false pretenses or fraudulent representation)
18 U.S.C. § 2 (aiding and abetting the above)
Counts 15-16-17-18-19-20; 18 U.S.C. § 1988 & § 1990(c) (disclosure requirements upon transfer of automobile)
18 U.S.C. § 2 (aiding and abetting the above)

Sexton:

Count 1; 18 U.S.C. § 371 (conspiracy)
Counts 2-3-4-5-6; 18 U.S.C. § 513 (possession of forged and counterfeited securities with intent to deceive)
18 U.S.C. § 2 (aiding and abetting the above)
Counts 7-8-9-10-11; 18 U.S.C. § 1341 (obtaining money or property by false pretenses or fraudulent representation)
18 U.S.C. § 2 (aiding and abetting the above)
Counts 12-13-14-15-16; 18 U.S.C. § 1988 & § 1990(c) (disclosure requirements upon transfer of automobile)
18 U.S.C. § 2 (aiding and abetting the above)

See document 50 of record.

indictments the United States (government) has brought against them.[2] Their defenses, *inter alia*, center on the application of the statute of limitations and the defendants' withdrawal from the conspiracy and substantive offenses.[3] For reasons which follow, the court will deny the defendants' motions.

I.

The factual background of this case begins in South Carolina, where defendant Waldrop allegedly originated the odometer tampering scheme.[4] At all times relevant to this Memorandum, defendant Waldrop was the chief operating officer of Auction Recon Center, Inc., a South Carolina corporation and a wholesaler of used automobiles. Defendant Sammy Little owned Little's Used Cars, an automobile dealership, both wholesale and retail, also located in South Carolina. Defendant Wayne Sexton was an automobile mechanic who worked as an independent contractor for Auction Recon Center, reconditioning and repairing automobiles. Defendant Larry Walsh, a purchaser and wholesaler of used automobiles, operated State Auto Sales, located in Dupont, Pennsylvania. Pat Walsh, the brother of Larry Walsh, was the owner of Honesdale Lincoln Mercury.

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[2] Defendant Walsh has not joined in these motions. Although defendant Little had joined in these defense motions, his claims have been mooted by his subsequent change in plea to guilty per an agreement with the government.

[3] The defendants originally asserted a fifth amendment due process violation because of pre-indictment delay but were unable to present any competent evidence or argument demonstrating prejudice. *See United States* v. *Otto*, 742 F.2d 104 (3rd Cir. 1984), *cert. denied*, 105 S. Ct. 978. Consequently, this argument will not be addressed.

[4] Unless otherwise noted, the recitation of the facts is taken from the stipulations of fact entered into by the government and defendants Waldrop, Little and Sexton.

According to the government, the scheme unfolded as follows:[5] Waldrop would purchase high-mileage used cars for the purpose of resale. Once Waldrop received the cars, he would arrange for defendant Sexton to roll back their odometers.[6] Waldrop then directed the employees of Auction Recon Center to prepare bills of sale, title transfer documents, and odometer statements to appear as though Auction Recon Center had sold the cars at their correct high-mileage figures to defendant Sammy Little's used car dealership. The next step involved Waldrop directing Auction Recon employees to prepare transfer documents of the same cars from Little's Used Cars to State Auto Sales, defendant Walsh's dealership. However, the transfer documents from Little to Walsh contained the rolled back low-mileage readings that Sexton had accomplished at Waldrop's direction.

Little played an intermediate role in the scheme. In reality, the cars were sold directly from Waldrop to Walsh. Little had never seen most of the cars that he had "bought" from Waldrop and later "sold" to Walsh. The government has characterized Little as a mere "straw" who acted as a front for the sham sales. Little's involvement consisted primarily of signing the paperwork that gave the appearance that he was involved in the transactions.[7] In return, Waldrop paid Little initially $100.00 per car, which was raised to $150.00 a car by the time the scheme had been discovered.[8]

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5. The following is taken from the government's first, second and third briefs, *see* documents 45, 57, and 75, respectively, of record, along with the superseding indictment. *See* document 50 of record.

6. This process is sometimes referred to as "clocking."

7. The paperwork included invoices, odometer statements, and checks that reflected the purchase from Waldrop of the high-mileage automobiles.

8. Both defendants Waldrop and Little were under the impression that they were committing misdemeanors punishable by fines. Accordingly, part of the arrangement between Little and Waldrop was an agreement that Waldrop would pay Little's fine should the authorities charge Little.

As stated above, defendant Walsh was the true purchaser of Waldrop's clocked automobiles. When paying for the cars, Walsh would make a check payable to Little's Used Cars but would send it directly to Auction Recon Center. In return, Walsh would receive from Auction Recon the invoices and low-mileage odometer statements which reflected the purported sale from Little to Walsh, along with the cars' titles.[9]

To complete a sale of the clocked cars, Walsh eventually had to be able to procure a transferable title that reflected the cars clocked odometer.[10] Allegedly Walsh "took whatever action was necessary" to obtain new titles for the cars that reflected the cars' clocked mileage. *See* document 57 of record. This required altering the certificates of title to conform to the clocked odometer readings, which, in turn, included forging the names of his brother and employees of Auction Recon Center and returning them to Penn DOT to obtain new titles that reflected those false clocked mileage figures.[11] Walsh then sold the cars with their new falsified titles to other dealers, consumers, etc. Cars #7 and #8, reflecting Counts 7-13-14-20 of the superseding indictment, represent the scheme's end product.[12]

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9. The cars' titles mostly reflected the cars' high-mileage odometer figures.

10. Apparently, the government itself does not know exactly how Walsh managed to get new titles for the cars from the Pennsylvania Department of Transportation (Penn DOT) that reflected the clocked mileage on the cars. The government does not expand, however, on its allusion to other methods which Walsh may have employed to accomplish this feat.

11. To "alter" the titles, Walsh would simply "erase" the existing odometer statement on the back of the title and write in the new clocked figure. He would then send the forged title into Penn DOT and request a new title. The new title would then reflect the car's clocked mileage.

12. *See* document 50 of record. Walsh sold the cars, under the Honesdale Lincoln-Mercury name, as follows:

> **Car 7:** Sold to Independence Ford on *February 14, 1986.* Independence Ford, in turn, sold the car to Margaret Young on *August 14, 1986.*

(footnote continues)

Sometime in May and June of 1985, the scheme went awry.[13] Walsh had sent 12 altered titles into Penn DOT for reissuance. The 12 titles represented cars with clocked odometers pursuant to the alleged plan. Penn DOT, however, upon inspection of the titles, detected apparent alterations to the mileage readings, and seized them, along with their accompanying applications for new Pennsylvania titles. Five of the above mentioned titles represent cars 1, 2, 4, 5, and 6 of the indictment, reflecting Counts 2-8-15, 3-9-16, 4-11-17, 5-12-18, and 6-19, respectively.[14] United States Attorney Don Burley received the 12 seized titles from Penn DOT in August of 1985, and he has retained possession of the titles as of the date of this Memorandum.

Notwithstanding the title confiscation, Walsh still had these cars on his hands and had to take additional steps to sell them. However, to properly effectuate their sale, Walsh had to procure new titles that contained the falsified odometer readings. Thus, on August 12, 1985, Walsh and his attorney, Ralph Iori, contacted Burley concerning the confiscated titles. During the course of their conversation, Walsh represented to Burley that he

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(footnote continued)

Car 8: Walsh sold this car under the State Auto Sales name on *June 21, 1985*, to Greytak Chevrolet. Greytak, in turn, sold the car to Crisconi Oldsmobile on *August 15, 1985*. Finally, Crisconi sold the car to Joseph Sapienza on *August 2, 1986*.

See document 80 of record.

13. The following is taken from documents 50 and 60 of record.

14. The title to Car #3 of the indictment (Count 10) was also seized by Penn DOT. In response, Walsh asked Waldrop to obtain a duplicate South Carolina title for the car. Waldrop complied and sent the title to Walsh "open," *i.e.*, devoid of transfer information. Walsh completed the title and resubmitted it to Penn DOT which issued a new title, reflecting the clocked mileage, on July 3, 1985. *See* document 80 of record.

Walsh sold the car under the State Auto Sales name to Jackson Motors on *July 3, 1985*. Jackson subsequently sold the car to Roger Hubert on *May 31, 1986*. *Id.*

had been victimized by Little, and was unaware of the fact that the cars had their mileage altered. A few months later, Walsh resubmitted the applications for new titles to Penn DOT.

On November 15, 1985, apparently believing that Walsh was an innocent victim, Penn DOT issued new titles to Walsh for the automobiles whose titles they had previously seized.[15] These titles represented cars 1, 2, 4, 5, and 6 of the indictment. On the back of each title, which would normally contain an odometer reading, there appeared the code "999." The code denoted that the true mileage of each car was either unknown or that the mileage on the odometer was incorrect.

In February and March of 1986, Walsh submitted the same "999" titles to Penn DOT under the auspices[16] of Honesdale Lincoln-Mercury (his brother Pat's dealership) for new titles.[17] Inexplicably, Penn DOT issued new titles to the cars containing the falsified odometer readings. He later sold the cars to other purchasers between May and September of 1986 through his brother Larry's Honesdale Lincoln-Mercury dealership without his brother's knowledge or consent.[18]

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15. The following is taken from the parties' stipulated facts. *See* document 60 of record.

16. Waldrop appears to argue that Larry Walsh had nothing to do with the submissions and sales of Honesdale Lincoln-Mercury. The court would note here that, according to the government, there was no "sale" of the five "999" clocked cars from State Auto Sales to Honesdale Lincoln-Mercury. On the contrary, the government asserts that the titles were fraudulently obtained through Little to Honesdale Lincoln-Mercury by, and for, Larry Walsh. *See* document 81 of record.

17. Indeed, the government claims that Larry forged his brother's signatures on all the necessary paperwork.

18. After Walsh, under the Honesdale Lincoln-Mercury (HL-M) name, received new titles for cars 1, 2, 4, 5, and 6, with the cars' false low-mileage on them, he subsequently sold them as follows:

> **Car 1:** Walsh received the new title on February 10, 1986. He sold the car under the HL-M name to Linda Young on *May 6, 1986.*

(footnote continues)

In the meantime, Burley's office had arranged for William C. Kadlowec to investigate the chains of title to the 12 cars in South Carolina. Bill Kadlowec[19] was an odometer-tampering investigator employed by the state of South Carolina and appointed as a special investigator to the Federal Grand Jury in South Carolina. Sometime in late August or early September of 1985, Kadlowec learned that Auction Recon Center had sold several used cars to Little, who, in turn, sold them to Walsh. As it appeared to Kadlowec, the cars' odometers had been tampered with while in Little's possession. Sometime around September, 1985, based upon odometer statements provided to Kadlowec by Waldrop, Kadlowec asked Waldrop to have Little contact him concerning the odometer readings.

On September 12, 1985, Kadlowec talked with Little concerning Little's involvement with the tampered odometers. During that conversation, Little confessed to his role in Waldrop's

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(footnote continued)

Car 2: Walsh received the new title on March 10, 1986. He sold the car under the HL-M name to Francis Grady on *May 7, 1986.*

Car 4: Walsh received the new title on February 10, 1986. He sold the car under the HL-M name to Charles Campfield on *August 5, 1986.*

Car 5: Walsh received the new title on March 10, 1986. He sold the car under the HL-M name to Neiman's Used Cars on *September 10, 1986.*

Car 6: Walsh, under the HL-M name, applied for a new title to this car on February 26, 1986 which Penn DOT later issued. He then sold the car to Tunimac Empire Motors on *March 11, 1987.*

See document 80 of record.

19. The following facts are taken from the declaration of William C. Kadlowec.

scheme. Later, on April 26, 1986, Walsh revealed to the government the true background of the scheme. However, the government alleges that it was not a complete revelation because he failed, at the time, to disclose that he was still in the process of unlawfully selling the clocked cars that he still possessed.[20]

On June 1, 1986, a Federal Grand Jury convened in Columbia, South Carolina, to investigate the alleged odometer tampering. At that time, odometer tampering was a misdemeanor under the applicable law, 15 U.S.C. 1990(c). Walsh, Little and Sexton[21] all testified before the grand jury.[22] After hearing the government's evidence, the grand jury did not return any indictments.

On April 30, 1991, a Federal Grand Jury in the Middle District of Pennsylvania returned an indictment against defendants Waldrop, Sexton, Little, and Walsh for their respective roles in the odometer-tampering scheme.[23] The government has stipulated that it has no evidence of odometer tampering, nor any affirmative acts relating to odometer tampering, by any of the defendants, except Walsh, since August of 1985. *See* document 50 of record. Now, more than five years after the moving defendants actively participated in the scheme, they face the government's charges.

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[20] Indeed, by the time the Grand Jury convened on June 1, 1986, Walsh had sold several of the vehicles contained in this indictment. (Counts 2-3-9-15 and 16).

[21] This is the first identification in the record of Sexton disclosing his role in the operation. The defendants, in their supplemental brief in support of their motion to dismiss, *see* document 44 of record, allude to possible statements of Sexton allegedly made to the authorities prior to his grand jury testimony. However, at this point, the reference remains unsubstantiated.

[22] As will be discussed later, the government insists that these defendants were less than fully cooperative.

[23] That same grand jury presented a superseding indictment on August 6, 1991, which is the subject of the present motions.

Consequently, inasmuch as the cut-off date for statute of limitations purposes is April 30, 1986, and defendants Little, Sexton and Walsh allegedly confessed and withdrew from the scheme, the moving defendants maintain that the indictments against them are time-barred. The government, on the other hand, steadfastly insists that a careful examination of the factual background of the case reveals that Walsh's part in the scheme occurred within the statute of limitations and, thus, all are culpable. The delay in indicting the moving defendants for their part in the scheme is the basis of the defendants' motions to dismiss the indictment.

II.

As an initial matter, the court would note that "[i]n considering a defense motion to dismiss an indictment, the district court accepts as true the factual allegations set forth in the indictment." *United States* v. *Besmajian*, 910 F.2d 1153, 1154 (3rd Cir. 1990) (citing *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 343 n. 16 (1952)). In so doing, the court's inquiry is, of course, whether the indictment properly alleges a criminal offense. *Id.*

III. Conspiracy

The defendants first argue that Count I of the indictment should be dismissed because the statute of limitations has already run on the conspiracy charges.[24] They assert that confession to the authorities is sufficient to withdraw from a conspiracy and that here it also insulated them from Walsh's criminal acts

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[24]. April 30, 1986, is the key date here because the Grand Jury returned the original indictment on April 30, 1991. The statute of limitations for the offenses begins to run upon the ceasing of the defendants' involvement in the scheme and lasts five years.

from the time Penn DOT seized the titles to cars 1, 2, 4, 5 and 6,[25] to the time he subsequently sold the cars to consumers. The defendants contend that the government's intervention, and their subsequent cooperation, terminated the conspiracy before April 30, 1986.

Defendant Waldrop argues that co-conspirators Walsh, Little and Sexton effectuated a withdrawal from the conspiracy when they confessed either to the investigator or before the Grand Jury.[26] This withdrawal, asserts Waldrop, relieved him of criminal responsibility for the conspiracy as well. Similarly, Sexton argues that his withdrawal of the conspiracy absolves him under Count I of the indictment.

By contrast, the government argues that defendants Little, Sexton and Walsh had not fully disclosed their parts in the alleged scheme. Moreover, it asserts that the defendants did not do "everything within their power" to "prevent the commission of [the] crime," citing *United States* v. *Piva*, 870 F.2d 753, 757 (1st Cir. 1989).[27] The government argues further that an assessment of the "quality" of the defendants' disclosures is required under *Hyde* v. *United States*, 225 U.S. 347 (1912). The gravamen of the government's position is that the defendants allowed the clocked cars to remain "in the pipeline," and that such passivity negated their attempted withdrawals.

"To establish a conspiracy under section 371, the Government must prove: (1) a combination of two or more persons, (2) an actual agreement, whether express or tacit, between those

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25. Defendant Waldrop cannot maintain this claim with regard to car 3 as he played a direct part in the acquisition of the car's new title, *i.e.*, he managed to secure a South Carolina title to the car and sent it "open" to Walsh so that Walsh could complete the scheme.

26. There is no contention that defendant Waldrop made any admissions to the authorities.

27. The government contends, *inter alia*, that the defendants should have attempted to "buy back" the automobiles with the clocked odometers, or sell the cars at their correct high-mileage figures and divide the loss.

persons, (3) an unlawful purpose, and (4) an overt act by one of the conspirators." *United States* v. *Bevans*, 728 F. Supp. 340, 345 (E.D.Pa. 1990) (citations omitted). Furthermore, "[a] defendant who is a member of a conspiracy may be charged with and convicted for substantive offenses committed by a co-conspirator in furtherance of the conspiracy at a time when the defendant was a member of the conspiracy." *United States* v. *Gonzalez*, 729 F. Supp. 1057, 1062 (D.N.J. 1990). Indeed, "[it] is sufficient that the substantive crime be 'reasonably foreseeable as a necessary or natural consequence of the unlawful agreement." *Id.* at 1063.

The government does not need to show that an alleged conspirator knew all the details of the conspiracy, or even that he knew all of the conspirators. *See, e.g. United States* v. *Janotti*, 729 F.2d 213 (3rd Cir. 1984); *see also United States* v. *Sophie*, 900 F.2d 1064, 1080 (7th Cir. 1990). Moreover, the success of a conspiracy is immaterial so long as one of the conspirators committed an overt act in furtherance of the conspiracy. *Sophie*, 900 F.2d at 1080.

As the government correctly noted, "an accused conspirator's participation in a criminal conspiracy is presumed to continue until all objects of the conspiracy have been accomplished or until the last overt act is committed by any of the conspirators." *United States* v. *Finestone*, 816 F.2d 583, 589 (11th Cir. 1987) (citations omitted). The presumption can be overcome, however, by the defendant's showing that he withdrew from the conspiracy. *Id.* Withdrawal is an affirmative defense, which the defendant has the burden of proving. *Id.*

In discussing the obligations of both the defense and prosecution where withdrawal is raised as a defense, the Third Circuit Court of Appeals has noted that at trial:

> [t]he defendant must present evidence of some affirmative act of withdrawal on his part, typically *either a full confession to the authorities* or communication to his co-conspirators that he has abandoned the enterprise and its goals. *United States* v. *Steele*, 685 F.2d 793, 803 (3rd

> Cir.), *cert. denied*, 459 U.S. 908, 103 S. Ct. 213, 74 L.Ed.2d 170 (1982). Once the defendant has made a *prima facie* showing of withdrawal, the burden shifts to the government either to impeach the defendant's proof or *to show some act by the defendant in furtherance of the conspiracy and subsequent to the alleged withdrawal. Id.*

United States v. *Jannotti*, 729 F.2d 213, 221 (3rd Cir. 1984) (emphasis added). The court went on to note that "one conspirator need not . . . be aware of all the details of the conspiracy in order to be found to have agreed to participate in it." *Id.* (citing *United States* v. *Riccobene*, 709 F.2d 214, 225 (3rd Cir. 1983)).

The conspirators' *modus operandi* contemplated the following: Waldrop bought high mileage used cars. Sexton rolled back the odometers. Waldrop arranged to have the cars spuriously transferred through Little to Walsh to appear as though Little rolled back the odometers. Walsh then acquired new titles to the cars reflecting the rolled back mileage. It was Walsh's role to adopt whatever means were necessary to ultimately sell these cars with false odometer readings to an unsuspecting public.

In applying the government's allegations to the facts which the court has before it, there can be little doubt that a jury could reasonably find that the government had not violated the statute of limitations with respect to the conspiracy count. The court cannot determine, as a matter of law, that defendants Little, Sexton and Walsh effectuated a withdrawal from the conspiracy from the facts presently before it.

A. Little. Defendant Little's cooperation with the authorities carries the strongest indicia of withdrawal. His signed confession to Bill Kadlowec of September 17, 1985, contained

references to all of the cars in the present indictment. Kadlowec conceded at a hearing in this court on October 17, 1991, that Little was "very" cooperative with his investigation of Waldrop.[28]

However, the court need not decide at this time whether Little's cooperation amounted to a withdrawal. Even assuming, *arguendo*, that Little had effectively withdrawn from the conspiracy prior to April 30, 1986, the fact of his withdrawal bears no legal significance to the moving defendants' motions. As noted above, a conspiracy requires a combination of only more than one person. Based upon the facts the court has before it, a jury could reasonably find that the conspiracy among defendants Waldrop, Sexton and Walsh survived Little's withdrawal. Thus, the government could arguably prove at trial that the conspiracy continued among the three remainders.

B. Sexton. Sexton argues that he withdrew from the conspiracy when he testified before the Grand Jury in South Carolina in June of 1986. The government argues that Sexton's testimony before the Grand Jury does not reflect that he was cooperating fully and, in any event, it occurred too late to have any significance on the statute of limitations issue.[29] With this latter position the court agrees. A jury should decide the former. Thus, Sexton cannot be deemed to have withdrawn, as a matter of law, from the conspiracy prior to April 30, 1986.

C. Walsh. The moving defendants argue vigorously that Walsh's actions pertaining to the selling of the cars listed in the indictment were the product of his own independent scheme to defraud the public and do not reflect his participation in the original plan with Waldrop. The government alleges that the obligation to implement the final phases of the plan was left to

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28. As previously stated, the government continues to argue that Little was still protecting Waldrop despite his cooperation with Kadlowec.

29. The court again would note an absence in the record of any cooperation by Sexton prior to the convening of the Grand Jury.

Walsh in Pennsylvania. Furthermore, it would appear that it was never intended that the South Carolina defendants would participate in the obtaining of false titles from Penn DOT.

All of the defendants were aware of the fact that these vehicles with clocked mileage readings had been delivered to, and were in the possession of, Walsh in Pennsylvania. The fact that Walsh may have encountered difficulty in procuring the false titles, *i.e.*, Penn DOT's seizure of five of the titles listed in the indictment, should not insulate the other defendants from criminal responsibility. The clocked vehicles that the South Carolina defendants had prepared, and the documents in support thereof, remained "in the pipeline" and on Walsh's lot in Pennsylvania. Thus, it cannot be concluded as a matter of law, that Walsh had withdrawn from the conspiracy by his subsequent actions.

It is true that the affirmative acts of all the defendants, with the exception of Walsh, ceased prior to April 30, 1986. It is also true that a confession, standing alone, would not terminate a co-conspirator's role in a conspiracy unless that confession constituted a complete withdrawal. Here, however, that question is best left for a jury. It is certainly arguable, at least, that even after the scheme was unraveling, a jury could conclude that the defendants did not remove themselves from the conspiracy.

IV. Substantive Offenses.

The moving defendants attack the government's substantive charges as time-barred as well. They first argue that they had effectively withdrawn from the scheme by the time Walsh carried out his alleged part and thus, they cannot be charged with mail fraud. Second, on a variation of that same theme, the defendants argue that, Walsh's procurement of new titles from Penn DOT after its issuance of "999" titles was an entirely independent plan which insulates them from criminal responsibility under the mail fraud statute. Finally, the defendants argue that the § 1988 and § 1990c charges are also time-barred.

With respect to the withdrawal, the government argues that withdrawal is no defense to mail fraud. The court agrees. In *United States* v. *Read*, 658 F.2d 1225 (7th Cir. 1981), the Court of Appeals discussed, in detail, the differences between a conspiracy and a scheme per the mail fraud statute. There the court stated that:

> [t]he predicate for liability for conspiracy is an agreement, and a defendant is punished for his membership in that agreement. Mail and securities fraud, on the other hand, punish the *act* of using the mails or the securities exchanges to further a scheme to defraud. No agreement is necessary. A party's "withdrawal" from a scheme is therefore no defense to the crime because membership in the scheme is not an element of the offense. . . . As an aider and abettor, [the defendant] need not agree to the scheme. He need only associate himself with the criminal venture and participate in it.

Id. at 1240 (citing *United States* v. *Beck*, 615 F.2d 441, 448-49 (7th Cir. 1980)). The court here is satisfied that the government has adequately alleged the moving defendants' participation, at least as aiders and abettors, in the odometer tampering plan.

Equally unpersuasive is the defendants' argument that Walsh's acquisition of new titles reflecting the clocked mileage of the cars from Penn DOT after it had issued "999" titles to those same cars was a wholly independent scheme within the meaning of the mail fraud statute. As noted in the discussion of the conspiracy charge, the court rejects the defendants characterization of Walsh as a wholly independent actor. The government has sufficiently alleged that Walsh's part in the overall scheme was to procure titles to the clocked cars and sell them to an

unsuspecting public.[30] That Waldrop and Sexton were unaware as to how Walsh went about his task is irrelevant. See *United States* v. *Bibby*, 752 F.2d 1116, 1124 (6th Cir. 1985).

Both parties disagree on the application of the reasoning in *Schmuck* v. *United States*, 489 U.S. 705 (1989) to the issues in this case. *Schmuck* concerned an odometer tampering scheme substantially similar to the one presented here. The defendants maintain that the case is factually distinguishable because, as they interpret *Schmuck*, its applicability requires an *ongoing* odometer tampering scheme which is absent in this case. The court disagrees. As in *Schmuck*, the instant scheme depended upon, for its completion, a "successful passage of title among the various parties." *Id.* at 712. There, Justice Blackmun opined that,

> although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetration of Schmuck's scheme. As noted earlier, a mailing that is "incident to an essential part of the scheme" . . . satisfies the mailing element of the mail fraud offense.

Id. at 712. *See also United States* v. *Locklear*, 829 F.2d 1314 (4th Cir. 1987) (it was reasonably foreseeable to defendant that certificates of title would be mailed to consumers from a department of transportation and that the certificates would reflect fraudulent odometer statements). Mindful of the fact that all of the defendants were experienced in the business of selling used cars, it appears that a jury could find that the title mailings were

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30. In this regard, any claim that an intermediate sale to other used car dealers constituted the completed offense is unimpressive. The indictment charges that the conspiracy and substantive objective of the scheme was to defraud public consumers. If a jury finds that this was the plan's objective, then an in-between sale to another dealer is of no moment. *United States* v. *Schmuck*, 489 U.S. 705 (1989).

foreseeable by them should the government prove the scheme as it is here alleged. *United States* v. *Shryock*, 537 F.2d 207 (5th Cir. 1976).

Finally, the defendants' perceived statute of limitations violations concerning the § 1988 and § 1990c charges are baseless. Ultimate purchasers of clocked automobiles are "transferees" for purposes of § 1988. *See State of Utah* v. *B & H Auto*, 701 F. Supp. 201 (D.Utah 1988).

V.

In conclusion, after considering the record as it now exists, and the arguments of counsel, it is obvious that, at the least, there are factual disputes concerning the time and the extent of the defendants' efforts to terminate the scheme not only as to the conspiracy count but as to the substantive counts as well. The appropriate vehicle for evaluating the evidence and making factual determinations is a trial by jury. Accordingly, the defendants motions will be denied and an Order to that effect will accompany this Memorandum.

s/
United States District Judge

November 12, 1991

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, VS. N.A. WALDROP (a/k/a "FAT" WALDROP) LAWRENCE WALSH SAMMY LITTLE, and WAYNE SEXTON	CRIMINAL NO. 3:91-083-01

STIPULATIONS ENTERED INTO BY THE UNITED STATES OF AMERICA AND THE DEFENDANTS, WALDROP, LITTLE AND SEXTON

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1. N.A. "Fat" Waldrop is the Chief Operating Officer of Auction Recon Center, Inc., a South Carolina corporation and a wholesaler of used automobiles located in Greenville, South Carolina.

2. Sammy Little was the owner of Little's Used Cars, an automobile dealer, wholesaler, and retailer, located in Easly, South Carolina.

3. Wayne Sexton was an automobile mechanic. Among other things, he did some work as an independent contractor at Auction Recon Center in the reconditioning and repairing of automobiles.

4. Larry Walsh was a purchaser and wholesaler of used automobiles. He operated his business under the name of State Auto Sales, which was located in Dupont, Pennsylvania. Larry Walsh

assumed the operations of State Auto Sales from his brother, Pat Walsh. Pat Walsh is the owner of Honesdale Lincoln Mercury, located in Honesdale, Pennsylvania.

5. Don Burley is and was a staff attorney with the Department of Justice, Office of Consumer Litigation, in Washington, D.C. He became aware of the alleged odometer tampering of cars sold by some of the Defendants in August of 1985. Mr. Burley is also the lead attorney in this prosecution.

6. William Kadlowec, an investigator employed by the State of South Carolina, was appointed as a special investigator for the Federal Grand Jury in South Carolina and detailed to the United States Attorney's Office investigating odometer turnbacks.

7. The government has no evidence of odometer tampering or affirmative acts committed by the Defendants, Waldrop, Little and Sexton, related to odometer tampering or title washing after August of 1985.

8. In July or August of 1985, Defendant Waldrop stopped selling "clocked" cars to Walsh, and the government has no evidence that Defendant Waldrop sold any "clocked" cars to Little after that time.

9. In May and June of 1985, the Pennsylvania Department of Transportation seized 12 automobile titles submitted by State Auto Sales, along with its applications for new Pennsylvania titles.

10. Defendant Walsh requested duplicate titles from Defendant Waldrop for 10 of these 12 cars, some of which had already been sold. At least three duplicate titles were sent to Defendant Walsh in June or July of 1985.

11. Five of the titles seized by the Pennsylvania Department of Transportation relate to the automobiles listed in this Indictment.

12. Pennsylvania sent the original 12 seized titles to Don Burley in August of 1985.

13. On August 12, 1985, Attorney Ralph Iori of Scranton, Pennsylvania, representing Larry Walsh and Pat Walsh, had a telephone conversation with Don Burley to discuss the problems caused by the confiscation of these titles.

14. On August 12, 1985 and on April 26, 1986, Larry Walsh had conversations with Mr. Burley and others of the Department of Justice. He appeared and testified before the Grand Jury in June of 1986.

15. On September 17, 1985, Defendant Little gave a statement to Federal Investigator William Kadlowec witnessed by Lance D. Thomas, investigator for the United States Department of Transportation, which detailed the activities of State Auto Sales, Dupont, Pennsylvania, and Auction Recon Center in Greenville, South Carolina. This statement referred to, by serial number, all the cars contained in the Indictment filed on April 30, 1991.

16. The statement supplied by Defendant Little included a representation that the odometers of the automobiles had been rolled back. Said rollbacks occurred earlier in 1985. Defendant Little has cooperated on numerous occasions since that time with the government.

17. Although not all the records requested by the government have been produced by Auction Recon Center, the records which Auction Recon Center represents as all their records on the automobiles referred to in the Indictment have been produced.

18. On or about November 15, 1985, the Department of Transportation for the State of Pennsylvania issued titles for five of the automobiles listed in the indictment. The titles bear the code number "999"[1] denoting true mileage unknown.

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[1] 999 is a number issued on the odometer block of a Pennsylvania title in the place where the car's mileage, in thousands, is to be printed; it thus indicates that the true mileage is unknown or that the mileage on the odometer is not correct.

19. A Grand Jury investigation was commenced by June 1, 1986 in Columbia, South Carolina, and all of the Defendants Walsh, Little and Sexton memorialized their testimony before the Grand Jury.

20. Defendant Walsh is expected to testify that, prior to appearing before the South Carolina Grand Jury, he had a telephone conversation with Defendant Waldrop during which Waldrop told Walsh, "I don't want anyone to lie for me" or words to that effect.

21. The government has received from Walsh at least 14 checks written by State Auto Sales to Wayne Sexton, as payment for rolling back the odometers on cars. The last check was dated August 16, 1985.

22. Prior to the June 1986 Grand Jury in Columbia, South Carolina, the United States Attorney in Columbia, South Carolina had handled all of its odometer-tampering cases through the charging of odometer tampering under 15 U.S.C. 1990(c), which was at that time a misdemeanor offense.

23. The Grand Jury in South Carolina, after hearing whatever the government presented, was never presented, and never returned, an indictment.

24. In February and March of 1986, Larry Walsh submitted to the State of Pennsylvania "999" titles and requested that new titles. Each of the new titles issued by Pennsylvania included the car's false low mileage figure.

25. The signatures of representatives of Auction Recon Center were forged by, or at the direction of, Defendant Walsh of State Auto Sales on numerous title documents surrendered by State Auto Sales to the Pennsylvania Department of Transportation.

26. The automobiles which were subject to these titles were sold by Larry Walsh under the name of his brother's dealership,

Honesdale Lincoln Mercury. The particular way this occurred was without the knowledge of the Defendants, Waldrop, Sexton or Little.

27. Defendant Little will testify that Mr. Kadlowec told him in September of 1985 that he did not need a lawyer and that he would not be charged.

28. Defendant Little was granted immunity, according to the letter of Marsha Mills of December, 1988, by the Commonwealth of Pennsylvania.

29. The Grand Jury on August 6, 1991 was the same Grand Jury that issued the April 30, 1991 Indictment.

30. The Federal Statute of Limitations, Title 18, U.S.C. Section 3282, applies to this prosecution.

31. By letter dated February 27, 1989, Mr. Burley submitted to Defendant Waldrop and to Auction Recon Center proposed agreements which he had prepared to toll the running of the Statute of Limitations.

32. By letter dated March 22, 1989, counsel for Defendant Waldrop and for Auction Recon Center advised Mr. Burley that neither Waldrop nor Auction Recon Center was willing to sign the proposed tolling agreements.

We so stipulate:

s/
Don O. Burley
Trial Attorney for
Office of Consumer
Litigation
Department of Justice

s/
Joel W. Collins

s/
Sal Coghetti, Jr.
Attorneys for Defendant
N.A. "Fat" Waldrop

s/
Dallas D. Ball
Attorney for Defendant
Sammy Little

s/
Melinda C. Ghilardi
Attorney for Defendant
Wayne Sexton

Dated: August 29, 1991

Q Do you make a pretty good living doing that?

A Well, you know, sometimes you do. But you don't any more because any more I hardly ever do any.

Q It has cut back some now?

A Sir?

Q Has it cut back some now?

A It's about cut off, you know what I mean?

Juror:

Q Did you file income taxes during those years that you were receiving that as income showing that as income?

A I have filed.

By Mr. Bethea:

Q Has Mr. Waldrop stopped doing this for people now?

A Yes, sir.

Q Are you sure?

A Yes, sir. We don't — I ain't done one in I'd say I don't know how long to say. It's been a while.

Q So Mr. Waldrop is not doing it anymore?

A No, sir.

Q He will not roll back a car no matter what I offer him?

A No, sir.

Q Are you certain of that?

A I'm sure.

Q And how long has that been going on?

A What?

Q If we looked at the paperwork we can tell when the cars were rolled back and when they weren't. How long has

Mr. Waldrop been stopped doing this? I mean, at some point in time he must have realized, "All right, it's time to get out of this business."

A Probably '84 or '85; I ain't sure.

Q At that point did he ever come out and say, "Enough is enough. The government is getting into this now, so let's just quit. The time for this has passed."

A No. He said, you know, he wasn't going to do it.

Q He has never made an effort to stop this? He has never come out and told the employees to stop doing this?

A What do you mean?

Q That he has never come out and told the employees, "It's time to quit this"?

A No, he ain't said nothing to the employees about that.

Q So for all you know he's still doing it?

A Well, he could be, but I ain't doing it anymore.

Q Do you know of any other people that have been the spinner for Mr. Waldrop?

A No, sir.

Q You are the only one?

A Yes.

Mr. Bethea: Any more questions?

Juror:

DOBurley/sts
183-36-3

Washington, D.C. 20530

February 27, 1989

AIRBORNE EXPRESS

G. Wells Dickson, Jr., Esq.
Collins & Lacy
Suite 601, 1330 Lady Street
Columbia, South Carolina 29201

Re: Grand Jury Investigation of Auction
Recon Center, Inc. and N.A. Waldrop

Dear Mr. Dickson:

First, I would like to confirm the phone conversation we had on Friday, October 24, 1989, in which I informed you that your client, N.A. Waldrop, is now a target of the grand jury's investigation (although I don't believe we discussed it, Auction Recon Center, Inc., is also now a target).

Second, as we also discussed, I have enclosed two tolling agreements, one relating to charges that could be filed against N.A. Waldrop, and the other relating to charges that could be filed against Auction Recon Center, Inc.

If you have any questions, please call me at 202-724-6158. Otherwise, I would appreciate it if you would have the agreements executed and sent to me as quickly as possible. Thank you again for your cooperation.

Sincerely yours,

s/
DON O. BURLEY
Attorney
Office of Consumer Litigation

TOLLING AGREEMENT — N.A. WALDROP

I, N.A. Waldrop, having been informed that the government is currently considering the filing of criminal charges against me (either through an indictment or an information); having been further informed that the statute of limitations may shortly run with respect to certain of these charges; having conferred with counsel; and having been advised of the legal implications of this Tolling Agreement; hereby agree to the following.

In consideration of the government delaying final action with respect to the filing of criminal charges against me, I hereby agree that the statute of limitations shall be tolled with respect to any criminal charges that may relate in any way to the purchase, sale, or titling of motor vehicles. I understand that the effect of this Tolling Agreement will be that, unless the statute of limitations has already run as of this date, I will not be able to raise the statute of limitations as a defense to any such criminal charges hereafter filed against me. I further understand that the statute of limitations will continue to be tolled with respect to such charges until thirty (30) days after I have notified both the United States Attorney's Office of the District of South Carolina and the Office of Consumer Litigation of the United States Department of Justice, in writing by certified mail, that I no longer desire that the statute of limitations continue to be tolled.

I fully understand the consequences of this Tolling Agreement.

Executed this day of 1989.

By: _____
N.A. Waldrop

_____
Attorney for N.A. Waldrop

Approved:

_____
Don O. Burley
Attorney
Office of Consumer Litigation
United States Department of Justice

[Letterhead]

March 22, 1989

Don O. Burley, Esquire
Department of Justice
Post Office Box 368
Washington, DC 20044

RE: Subpoena to testify before Grand Jury as Custodian
of records for Auction Recon Center, Inc.
Grand Jury Subpoena No.: 88-1207/Dec. 1
Our File No.: 86-8-129

Dear Mr. Burley:

As we discussed on March 9, 1989, our client is not willing at this time to toll the statute of limitations as to any criminal charges that may be brought against him. Thank you for renewing your invitation to me to come to Washington to review the documents that you have and to explain to us how you intend to use them to show the criminal activity which you allege our client was involved in. It is my understanding that when you have completed your trial problems that you will contact me so that we may schedule my coming to your office.

On March 9th, you also advised me that Bill Kadlowec would contact me to provide me with the information which we requested concerning the vehicles which we are having difficulty locating. As of this date I have not heard from Mr. Kadlowec.

I look forward to talking with you at your earliest convenience.

Sincerely,

s/
G. WELLS DICKSON, JR.

GWDjr:tIb
bcc: Mr. N. A. Waldrop

did emphasize the awesome responsibility and, indeed, it is. If anyone thinks that you come into this courtroom emotionless and just going through a day's work, that's a grave mistake. It's a very punishing assignment to have and I have never approached the sentencing process without some personal affect or impact, indeed, sometimes even agony.

And over the years, in sentencing, I've made my mistakes. I think probably sometimes I have sentenced too harshly, but I believe most of the time I've been on the lenient side, and in many instances, especially in the odometer area, that leniency has not accomplished what it was intended to accomplish.

If I'm to believe what I'm being told in the submissions, the sentencing submissions, odometers, the fact that they've been prosecuted in this District for 15 years or so, and although some have received prison sentences, most have not, and that the practice still continues, so it might cry out for a more severe attitude on the part of the sentencing court.

But you have a job to do, both of you, and you do it extremely well. And I know there are family members here for all Defendants. And I think, once again putting this in proper perspective, I'm the one, you're right, who makes the decision.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 92-7144

UNITED STATES OF AMERICA
v.
N.A. WALDROP

Sur Petition For Rehearing

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and SEITZ*, *Circuit Judges*

The petition for rehearing filed by Appellant N.A. Waldrop in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/
Chief Judge

Dated: January 14, 1993

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* Hon. Collins J. Seitz, senior circuit judge, as to panel rehearing only.

accepted by me as factual; but as to Walsh, no, it wouldn't be. If he says something and the Government says, We don't accept that, he's lying, he was lying at that time; it's not for me to say that he -- and they can establish that or rebut the veracity of his statement -- then we do have a factual issue.

MR. BALL: Asking them to admit to the truth of the matters asserted. Do they agree that the facts of this document were signed --

MR. CHASNOW: Yes.

THE COURT: I want to move on, now, because as I say, there's going to have to be another hearing. Let me ask you, Mr. Cognetti, the Government points out in the brief -- you didn't read it, but it was going to be a question I was going to ask anyway. Let's assume all kinds of prosecutorial misconduct. What's the prejudice that would warrant a finding under Marion that this indictment should be dismissed because of a preindictment delay? You may address it.

MR. COLLINS: Judge, if I may answer that, as we indicated in our memorandum, we have never been provided with a copy of the grand jury presentation made here in the Middle District of Pennsylvania on April the 30th, 1986. There's a great deal of case law out there which says that a separate grand jury who has not heard any testimony, must be provided with the actual evidence, if it's available, and must be given an accurate and thorough discussion of the issues and should not

§ 1988. Disclosure requirements upon transfer of ownership of motor vehicle

Promulgation of rules

(a) Not later than 90 days after October 20, 1972, the Secretary shall prescribe rules requiring any transferor to give the following written disclosure to the transferee in connection with the transfer of ownership of a motor vehicle:

(1) Disclosure of the cumulative mileage registered on the odometer.

(2) Disclosure that the actual mileage is unknown, if the odometer reading is known to the transferor to be different from the number of miles the vehicle has actually traveled.

Such rules shall prescribe the manner in which information shall be disclosed under this section and in which such information shall be retained.

Violations of rules and giving false statements to transferees prohibited

(b) No transferor shall violate any rule prescribed under this section or give a false statement to a transferee in making any disclosure required by such rule.

Acceptance of incomplete written disclosure by transferees acquiring ownership for resale prohibited

(c) No transferee who, for purposes of resale, acquires ownership of a motor vehicle shall accept any written disclosure required by any rule prescribed under this section if such disclosure is incomplete.

(Pub.L. 92-513, Title IV, § 408, Oct. 20, 1972, 86 Stat. 962; Pub.L. 94–364, Title IV, § 406, July 14, 1976, 90 Stat. 983.)

1. Weight and sufficiency of evidence

Finding that automobile dealership had disconnected odometer in violation of criminal statute was sufficiently supported by evidence that car had been in custody and control of dealership, and that it was sold with inoperative odometer and with uncharacteristic tire tread wear. U.S. v. Hugh Chalmers Chevrolet-Toyota, Inc., C.A.8 (Ark.) 1986, 800 F.2d 737.

Although crimes of rolling back odometers were supposedly not limited to motor vehicle specified and were committed from, on or about a date extending beyond and within the limitations statute, the indictment would not be dismissed on limitations grounds, but the Government was to provide, in the bill of particulars, details about the actual dates on which those crimes were alleged to have been committed sufficient to insure that only crimes allegedly committed within the limitations period were being prosecuted. U.S. v. Castellano, D.C.N.Y.1985, 610 F.Supp. 1359.

2. Indictment

Ordinarily, mere change in dates is not considered substantial variation in indictment, but exception exists where particular day may be made critical by this section. U.S. v. Cina, C.A.Wis.1983, 699 F.2d 853, certiorari denied 104 S.Ct. 481, 464 U.S. 991, 78 L.Ed.2d 679.

3. Admissibility of evidence

Fact that no court seal was used, as required by W.Va.Code 57–1–12, in admitting in proceedings before License Certificate Appeal Board, documents from federal court showing, inter alia, that used car dealers had pled guilty to knowingly and wilfully disconnecting, resetting and altering odometers, did not affect their admissibility, where there was substantial compliance with state law, both dealers acknowledged that they pled guilty to charges and were fined and on probation, no objections were made to admission of documents at hearing, and testimony alone would have supported administrative ruling revoking their licenses. Butler's Discount Auto Sales, Inc. v. Roberts, W.Va.1983, 303 S.E.2d 722.

§ 1988. Disclosure requirements upon transfer of ownership of motor vehicle

[See main volume for text of (a) to (c)]

(d) Statement by transferor of mileage disclosure required under subsection (a) prior to licensing by transferee

(1)(A) Any motor vehicle the ownership of which is transferred may not be licensed for use in any State unless the transferee, in submitting an application to a State for the title upon

which such license will be issued, includes with such application the transferor's title and, if that title contains the space referred to in paragraph (2)(A)(iii), a statement, signed and dated by the transferor, of the mileage disclosure required under subsection (a) of this section.

(B) This paragraph shall not apply to any transfer of ownership of a motor vehicle which has not been licensed before the transfer.

(C) In the case of a transferor to whom title to a motor vehicle has been issued by any State and such title is, at the time of a transfer of such motor vehicle, physically held by a lienholder, nothing in this subsection shall be construed to prohibit for purposes of the mileage disclosure requirements of this section the use of a written power of attorney (if otherwise permitted by State law) in a form, and under reasonable conditions, prescribed by rule by the Secretary before February 1, 1989. The rule shall (i) ensure disclosure on the power of attorney document of the actual mileage at the time of the transfer, and (ii) ensure that such mileage will be restated exactly by the person exercising the power of attorney in the space referred to in paragraph (2)(A)(iii). The rule, consistent with the purposes of this chapter and the need to facilitate enforcement thereof, shall prescribe that the form be issued by the State to the transferee in accordance with paragraph (2)(A)(i), shall prescribe that the person granted such power of attorney shall retain a copy of such power of attorney and shall submit the original back to the State with a copy of the title showing the restatement of the mileage, and may prescribe that the State retain the power of attorney and the copy of the title for an appropriate period or that the State adopt alternative measures consistent with the purposes of this subchapter, taking into consideration costs to the State. The rule shall not require that a vehicle be titled in the State in which the power of attorney was issued. The provisions of sections 1990b and 1990c of this title shall apply to any person granting or granted such power of attorney.

(2)(A) Any motor vehicle the ownership of which is transferred may not be licensed for use in any State unless the title which is issued by the State to the transferee following such transfer—

(i) is set forth by means of a secure printing process (or other secure process);

(ii) indicates the mileage disclosure required to be made under subsection (a) of this section; and

(iii) contains a space for the transferee to disclose (in the event of a future transfer) the mileage at the time of such future transfer and to sign and date such disclosure.

(B) The requirements of subparagraph (A) shall not be construed to require a State to verify, or preclude the State from verifying, the mileage information contained in the title.

(e) Written disclosure regarding mileage by lessee to lessor upon lessor's transfer of ownership of leased motor vehicle

(1) In the case of any leased motor vehicle, the rules under subsection (a) of this section shall require written disclosure regarding mileage to be made by the lessee to the lessor upon the lessor's transfer of ownership of the leased motor vehicle.

(2) Under such rules, the lessor of a leased motor vehicle shall provide written notice to the lessee regarding—

(A) such mileage disclosure requirements, and

(B) the penalties for failure to comply with them.

(3) The lessor shall retain the disclosures made by any lessee with respect to any motor vehicle under paragraph (1) for a period of at least 4 years following the date the lessor transfers that vehicle.

(4) For purposes of this section, if the lessor transfers ownership of any leased motor vehicle without obtaining possession of such vehicle, the lessor may, in making the disclosure required

by subsection (a) of this section, indicate on the title the mileage disclosed by the lessee under paragraph (1) unless the lessor has reason to believe that such disclosure by the lessee does not reflect the actual mileage of the vehicle.

(f) State alternative motor vehicle mileage disclosure requirements

(1) The requirements of subsections (d) and (e)(1) of this section respecting the disclosure of motor vehicle mileage when motor vehicles are transferred or leased shall apply in a State unless the State has in effect alternate motor vehicle mileage disclosure requirements approved by the Secretary. The Secretary may promulgate regulations establishing procedures for the consideration and approval of such alternate requirements.

(2) The Secretary shall approve alternate motor vehicle mileage disclosure requirements submitted by a State unless the Secretary determines that such requirements are not consistent with the purpose of the disclosure required by subsection (d) or (e) of this section, as the case may be.

(g) Recordkeeping requirements for auction company where motor vehicle sold at auction

If any motor vehicle is sold at an auction, the auction company which conducts such action shall establish and maintain for a period of at least 4 years following the date of such sale the following records:

(1) The name of the most recent owner of the motor vehicle (other than the auction company) and the name of the buyer of the motor vehicle.

(2) The vehicle identification number of the motor vehicle required under subchapter VI of this chapter or the National Traffic and Motor Vehicle Safety Act of 1966.

(3) The odometer reading on the date of which the auction company took possession of the motor vehicle.

(As amended Pub.L. 99–579, § 2(a), (c), Oct. 28, 1986, 100 Stat. 3309, 3310; Pub.L. 100–561, Title IV, § 401, Oct. 31, 1988, 102 Stat. 2817; Pub.L. 101–641, § 7(a), Nov. 28, 1990, 104 Stat. 4657.)

HISTORICAL AND STATUTORY NOTES

References in Text

The National Traffic and Motor Vehicle Safety Act of 1966, referred to in subsec. (g)(2), is Pub.L. 89–563, Sept. 9, 1966, 80 Stat. 718, as amended, which is classified generally to chapter 38 (section 1381 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1381 of this title and Tables.

Codification

Section 7(a) of Pub.L. 101–641, directed that the third sentence of subsec. (d)(2)(C) of this section be amended. The amendment was executed to the third sentence of subsec. (d)(1)(C) as the probable intent of Congress.

1990 Amendment

Subsec. (d)(1)(C). Pub.L. 101–641 inserted provisions permitting the rule to prescribe that the Sate retain the power of attorney and the copy of the title for an appropriate period of time or that the State adopt alternative measures, taking into consideration costs to the State, and providing that the rule not require that a vehicle be titled in the State in which the power of attorney was issued.

1988 Amendment

Subsec. (d)(1)(C). Pub.L. 100–561 added subpar. (C).

1986 Amendment

Subsecs. (d) to (g). Pub.L. 99–579 added subsecs. (d) to (g).

Effective Date of 1990 Amendment

Section 7(b) of Pub.L. 101–641, provided that "The amendment made by subsection (a) [amending subsec. (d)(1)(C) of this section] shall be effective on the date of enactment of this Act [Nov. 28, 1990] and the Secretary of Transportation shall implement the amended section by promulgating a revision of existing regulations within six months after such effective date. Such rule shall consider the need to facilitate normal commercial transactions in the sale or exchange of motor vehicles."

Effective Date of 1986 Amendment

Section 2(c) of Pub.L. 99–579 provided that:

"**(1) In general.**—Except as provided in paragraph (2), subsections (d), (e), (f), and (g) of section 408 of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 1988), as added by subsection (a) of this section [subsecs. (d) to (g) of this section], shall apply with respect to motor vehicles which are transferred after the date 30 months after the date of the enactment of this Act [Oct. 28, 1986].

"**(2) Revision of State laws to conform to amendments.—**

"**(A) Technical assistance.—** The Secretary of Transportation shall, upon application, assist a State in revising its laws to comply with the requirements of section 408(d)(1) and (2) of the Motor Vehicle Information and Cost Savings Act [subsec. (d)(1) of this section].

"**(B) Extension of time.—**If any State requires time, in addition to the period prescribed by paragraph (1) of this subsection, to revise its laws to achieve such compliance, the Secretary may, upon the request of such State, grant, by notice published in the Federal Register, the State such reasonable additional time as the Secretary determines is necessary to achieve such compliance. The Secretary shall include in the Federal Register notice the reasons for granting additional time. In granting additional time, the Secretary shall ensure that the State is making reasonable efforts to achieve such compliance.

"**(3) Motor vehicle defined.—**For purposes of this subsection, the term 'motor vehicle' has the same meaning as when used in the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 1901 and following) [this chapter]."

SUPREME COURT, U.S.
FILED
MAY 5 1993
OFFICE OF THE CLERK

No. 92-1454

In the Supreme Court of the United States

OCTOBER TERM, 1992

N.A. WALDROP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
DOUGLAS N. LETTER
JEFFREY B. CHASNOW
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether an indictment charging petitioner with conspiracy and with aiding and abetting related substantive offenses was timely brought when overt acts in furtherance of the conspiracy, as well as the substantive offenses, occurred within five years prior to the date of the indictment.

2. Whether petitioner, having entered a conditional plea of guilty that reserved only one issue for appeal, is foreclosed from challenging his conviction on other grounds.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1454

N.A. WALDROP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is unpublished, but the judgment is noted at 983 F.2d 1054 (Table). The opinion of the district court (Pet. App. 9-25) is reported at 786 F. Supp. 1194.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1992. A petition for rehearing was denied on January 14, 1993. Pet. App. 43. The petition for a writ of certiorari was filed on March 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a plea agreement, petitioner entered a conditional guilty plea in the United States District Court for the Middle District of Pennsylvania to one count of conspiracy, in violation of 18 U.S.C. 371; one count of possessing counterfeit or forged securities, in violation of 18 U.S.C. 513 (1988 & Supp. III 1991); one count of mail fraud, in violation of 18 U.S.C. 1341 (1988 & Supp. III 1991); and one count of violating federal requirements relating to the certification of odometer readings, in violation of 15 U.S.C. 1988 (1988 & Supp. III 1991) and 1990c. Petitioner reserved the right to appeal the district court's conclusion that petitioner's indictment was not barred by the statute of limitations. The court of appeals affirmed. Pet. App. 1-7.

1. On April 30, 1991, petitioner was indicted for various offenses relating to his involvement in an illegal odometer tampering scheme. A superseding indictment, returned on August 6, 1991, added further charges arising from the same scheme. Pet. App. 1-2, 16. Petitioner moved to dismiss the indictment on the ground that the charges were barred by the five-year statute of limitation and on the alternative ground that the pre-indictment delay violated his due process rights.[1] *Id.* at 9-10. Both claims were submitted on the basis of the factual allegations in the superseding indictment and on a stipulation of facts entered into by the parties. *Id.* at 2, 10, 17.

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[1] Petitioner incorrectly asserts, Pet. 8, 23, that he sought dismissal in the district court under the Sixth Amendment's Speedy Trial Clause. Petitioner's "Motion To Dismiss For Violation Of The Defendant's Fifth Amendment Right To Due Process Of Law" addressed only pre-indictment delay, and thus was grounded on the Due Process Clause, not the Speedy Trial Clause. See *United States* v. *MacDonald*, 456 U.S. 1, 7 (1982).

The facts alleged and stipulated were that petitioner purchased late-model, high-mileage used automobiles for resale through his South Carolina automobile wholesale business. A co-defendant, mechanic Wayne Sexton, altered the cars' odometers to show lower mileage readings, and petitioner then sold the cars to a Pennsylvania wholesaler, co-defendant Lawrence Walsh. In Pennsylvania, Walsh would obtain new titles reflecting the altered odometer readings and would then sell the cars to unsuspecting retailers. To help conceal his relationship with Walsh, petitioner first sold the "clocked" cars to another South Carolina dealer, co-defendant Sammy Little, who then completed the sales to Walsh.[2] Pet. App. 2-3, 10-12. Petitioner ceased selling clocked cars to Walsh in 1985, after Pennsylvania officials detected alterations in some titles Walsh had submitted for retitling. However, Walsh continued reselling clocked cars he had obtained from petitioner until September 1986; the superseding indictment alleged that Walsh committed four overt acts in furtherance of the original conspiracy after April 30, 1986. Petitioner did nothing to frustrate the consummation of the scheme. *Id.* at 3, 13-14.

The district court denied petitioner's pretrial motions. Pet. App. 8-25. The court ruled that it would be inappropriate to dismiss the conspiracy charge before trial because, based on the facts pleaded and stipulated, "a jury could reasonably find that the government had not violated the statute of limitations." *Id.* at 20. Specifically, the court rejected petitioner's contention that his co-conspirators' withdrawal had terminated the

[2] Title transfer documents for sales from petitioner to Little bore the correct mileages of the cars sold, while documents evidencing sales from Little to Walsh bore the altered mileages. Thus, Little functioned as the "straw" in the scheme. Pet. App. 11.

conspiracy prior to April 30, 1986, the statute of limitations cut-off date: "The court cannot determine, as a matter of law, that defendants Little, Sexton and Walsh effectuated a withdrawal from the conspiracy from the facts presently before it." *Ibid.* The court also upheld the substantive counts of the indictment, *id.* at 22-25, and rejected petitioner's claim of prejudicial pre-indictment delay. *Id.* at 10 n.3.

2. Following the district court's ruling, petitioner signed a plea agreement with the government, in accordance with which he later entered a conditional plea of guilty pursuant to Fed. R. Crim. P. 11(a)(2). The agreement reserved to petitioner the right to appeal the district court's ruling "denying [his] motion to dismiss the indictment on the ground that the offenses charged in it were barred by the applicable statute of limitations, 18 U.S.C. § 3282." C.A. App. 20. Petitioner reserved no other issue for appeal. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-7. The court found it "particularly significant that Walsh's illegal activities continued well past April 30, 1986," and therefore concluded that "there was no record basis to find that the conspiracy ended before the statute of limitations ran." *Id.* at 5. The court explained that "by pretermitting proceedings and pleading guilty, [petitioner] ha[d] given up his opportunity to raise the withdrawal issue as a fact matter before the jury. Thus, he [was] limited to showing withdrawal as a matter of law, and this he * * * failed to do." *Ibid.* The court next ruled that petitioner's substantive offenses were properly pleaded within the limitations period. *Id.* at 5-7. Finally, the court of appeals rejected petitioner's claim that the mailings supporting his mail fraud conviction were not in furtherance of the scheme to defraud, noting that that issue had "not been preserved for appeal" and that it was in any event meritless under this Court's

decision in *Schmuck* v. *United States*, 489 U.S. 705 (1989). Pet. App. 6 n.1.

ARGUMENT

1. Petitioner first contends that this Court should grant review to resolve a conflict among the courts of appeals respecting the assignment of the burden of proof when a defendant seeks to show his withdrawal from a criminal conspiracy. Petitioner correctly notes that in *United States* v. *Read*, 658 F.2d 1225 (1981), the Seventh Circuit concluded—disagreeing with all other circuits to consider the issue, as well as with the allocation of burdens outlined by this Court's decision in *Hyde* v. *United States*, 225 U.S. 347 (1912)—that placing on the defendant the burden of proving an affirmative defense such as withdrawal from a conspiracy would violate due process.

The conflict petitioner identifies, however, does not support plenary review in this case for two reasons. First, since the Seventh Circuit's decision in *Read*, this Court has decided cases undermining *Read*'s suggestion that the Due Process Clause forbids placing the burden of proving withdrawal on a defendant. For example, in *Martin* v. *Ohio*, 480 U.S. 228 (1987), this Court held that a State does not violate due process by requiring a murder defendant to bear the burden of proving self-defense. And in *Medina* v. *California*, 112 S. Ct. 2572 (1992), the Court ruled that a State may constitutionally require the defendant to bear the burden of proving incompetence. As with those other defenses, requiring a defendant to establish withdrawal does not "offend[] [any] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 2577. During the current Term alone, the Court has twice denied certiorari in cases raising the withdrawal issue on which petitioner seeks review, see

Varah v. *United States*, 113 S. Ct. 1045 (1993); *Payne* v. *United States*, 113 S. Ct. 811 (1992), and there is no reason for the Court to treat this case differently. Second, this case does not properly present the issue on which the courts of appeals are divided. Because petitioner pleaded guilty before trial, he reserved only the question whether his indictment was untimely as a matter of law. In finding that the stipulated facts *could* support a jury finding that the indictment was timely, it was unnecessary for the court of appeals to decide who would have borne the risk of nonpersuasion if the case had proceeded to trial.[3]

2. There is no greater merit to petitioner's related argument that the government should be estopped from prosecuting him as a consequence of having proposed an agreement tolling the statute of limitations, which petitioner rejected. Pet. 17-18. Because it was "not pressed or passed upon below," this issue is not properly before this Court. *United States* v. *Williams*, 112 S. Ct. 1735, 1738 (1992). In any event, the proposed tolling agreement (Pet. App. 37-38) merely attempted to forestall subsequent litigation about the scope and duration of petitioner's scheme. It did not concede that the statute of limitations had expired and did not otherwise assure petitioner that he would be successful in any

[3] Petitioner's challenge to the substantive offenses to which he pleaded guilty fails to the extent it is based on the same withdrawal theory on which he challenges his conspiracy conviction. See Pet. 18. In any event, petitioner's arguments do not warrant review. Whether petitioner aided and abetted Walsh's sales of clocked cars after April 30, 1986, Pet. 19, or whether Walsh's actions were reasonably foreseeable in the context of the odometer fraud scheme in which petitioner and Walsh were engaged, Pet. 20, are factual matters that petitioner chose not to pursue at a trial. In challenging his substantive convictions, petitioner presents no significant legal issue that warrants this Court's attention.

litigation raising the limitations issue. Moreover, the proposed agreement cannot support an estoppel defense in any event, as there is no definitive statement in the proposal upon which petitioner can claim to have relied to his detriment. See *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674-675 (1973).

3. Petitioner's remaining arguments, based on *United States* v. *Maze*, 414 U.S. 395 (1974), and *Doggett* v. *United States*, 112 S. Ct. 2686 (1992), are foreclosed by his guilty plea. As the court of appeals observed, petitioner's challenge to his mail fraud conviction based on *Maze* was not preserved for appeal when petitioner entered his conditional guilty plea. Pet. App. 6 n.1. Thus, petitioner is foreclosed from pursuing the challenge. See *United States* v. *Broce*, 488 U.S. 563 (1989). See also *United States* v. *Bell*, 966 F.2d 914, 915-916 (5th Cir. 1992); *United States* v. *Ramos*, 961 F.2d 1003, 1005-1006 (1st Cir.), cert. denied, 113 S. Ct. 364 (1992). In any event, even if not foreclosed, petitioner's argument would not merit this Court's attention. As the court of appeals observed, Pet. App. 6 n.1, this Court's opinion in *Schmuck* v. *United States*, 489 U.S. 705 (1989), defeats petitioner's attempt to redefine his mail fraud scheme. Addressing an odometer-tampering scheme very similar to petitioner's, *Schmuck* held that title-registration mailings satisfy the mailing element of a mail fraud offense. Petitioner attempts to distinguish *Schmuck* factually as involving a tampering scheme with "fewer steps and fewer persons." Pet. 21. Both lower courts in this case correctly rejected that distinction, noting that whatever the number of players in the scheme, the scheme depended, as it did in *Schmuck*, on "successful passage of title." Pet. App. 6 n.1 & 24 (quoting *Schmuck*, 489 U.S. at 712). See also *United States* v. *Locklear*, 829 F.2d 1314 (4th Cir. 1987), cited approvingly in *Schmuck*, 489 U.S. at 712, where the

number of steps and persons in the scheme were the same as in this case.

Petitioner's guilty plea similarly forecloses his claim based on *Doggett*. See, *e.g.*, *Cox* v. *Lockhart*, 970 F.2d 448, 453 (8th Cir. 1992); *United States* v. *O'Donnell*, 539 F.2d 1233, 1237 (9th Cir.), cert. denied, 429 U.S. 960 (1976). Indeed, petitioner failed even to raise a Sixth Amendment claim in the district court or the court of appeals.[4] In any event, *Doggett* is inapplicable to petitioner's challenge. Whereas *Doggett* addressed speedy trial rights implicated by delay "between accusation and trial," 112 S. Ct. at 2690, petitioner is complaining only about delay that occurred before charges were brought. As this Court has clearly stated, petitioner's claim "must be scrutinized under the Due Process Clause, not the Speedy Trial Clause." *United States* v. *MacDonald*, 456 U.S. 1, 7 (1982). Because *Doggett* did not address the due process inquiry, it did not, as petitioner suggests, Pet. 25, alter the actual prejudice requirement for cases of pre-indictment delay.[5] See

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[4] Following the court of appeals' decision, petitioner filed a petition for writ of error *coram nōbis* in the district court, raising the same argument based on *Doggett* that he raises here. On March 30, 1993, the district court rejected that petition, ruling that the claim under *Doggett* "was waived when [petitioner] entered his guilty plea," and that *Doggett* "did not, as the defendant contends, reject the due process pre-indictment delay rationale of *United States v. Marion*, [404 U.S. 307 (1971)], which requires a finding by the court that the Government intentionally delayed seeking the indictment in order to gain a tactical advantage and that the intentional delay caused actual prejudice to the defendant." Mar. 30, 1993 Order 2, 3.

[5] Nor for that matter did *Doggett* change the prejudice standard applicable to speedy trial claims. The Court explained its presumptive prejudice principle as simply an explication of well-settled precedent. See *Doggett*, 112 S. Ct. at 2690 (citing *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972)). That principle was available to

Pharm v. *Hatcher*, 984 F.2d 783, 786 n.5 (7th Cir. 1993); *United States* v. *Anagnostou*, 974 F.2d 939, 941-942 (7th Cir. 1992). Thus, even if he had properly preserved the issue, petitioner has failed to present a cognizable claim under *Doggett*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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petitioner when he pleaded guilty in December 1991. See *Burkett* v. *Fulcomer*, 951 F.2d 1431, 1442 n.13 (3d Cir. 1991) (describing issue presented in *Doggett*), cert. denied, 112 S. Ct. 3055 (1992). Thus, even if *Doggett* were applied as broadly as petitioner would like, petitioner's failure to pursue the prejudice issue in the court of appeals forecloses his present challenge. Cf. *Murray* v. *Carrier*, 477 U.S. 478, 486-487 (1986).